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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 35

EDWARD YELLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT[1]

OPINION BELOW

The opinion of the court of appeals is reported at 287 F. 2d 292.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961, and a petition for rehearing was denied on April 3, 1961. On April 21, 1961, Mr. Justice Black extended the time to file the petition for a writ of certiorari to and including June 2, 1961. The petition was filed on May 31, 1961 and certiorari was granted on October 9, 1961 (368 U.S.

[1] This brief replaces the original brief on the merits filed by the United States.

816; R. 229). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the questioning of petitioner by the House Un-American Activities Committee concerning his membership in the Communist Party and the Party's program of "colonization" of the steel industry was pursuant to a valid legislative purpose and consistent with petitioner's rights under the First Amendment.

2. Whether the trial court erred in excluding expert testimony on the factors which should be considered by the court in determining petitioner's rights under the First Amendment.

3. Whether petitioner was convicted under a statute which is unconstitutionally vague.

4. Whether the Committee violated its own rules in refusing to question petitioner in executive session.

STATUTES AND RULES INVOLVED

Section 192 of Title 2, U.S.C. (R.S. 102, as amended) and the pertinent portions of Rule XI of the House of Representatives and of the Rules of the Committee on Un-American Activities are set forth in petitioner's brief at pages 3–4.

STATEMENT

Petitioner was charged in a five-count indictment with having refused, in violation of 2 U.S.C. 192, to answer questions pertinent to the matter under inquiry asked him by the Committee on Un-American Activities of the House of Representatives. Count 5 was dismissed on motion of the government (R. 11).

Upon a trial without a jury, the court found petitioner guilty as charged in Counts 1, 2, 3, and 4. The court imposed a sentence of one year on each count, the sentences to run concurrently, and a fine of $250 (R. 116–118). The court of appeals affirmed the conviction. This Court granted certiorari (368 U.S. 816; R. 299); and after briefing and oral argument, the Court set the case for reargument (370 U.S. 931).

The pertinent facts may be summarized as follows:

1. The Committee on Un-American Activities passed a resolution on January 15, 1958, providing that hearings would be held in Gary, Indiana, to inquire into (Hearings,[2] p. 1956):

> 1. The extent, character, and objects of Communist infiltration and Communist Party propaganda activities in basic industry in the Gary, Indiana, area, the legislative purpose being to obtain additional information for use by the Committee in its consideration of Section 16 of H.R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and willfully becoming or remaining a member of the Communist Party with knowledge of the purpose or objective thereof; and for the additional legislative purposes of adding to the Committee's overall knowledge on the subject, so that Congress may be kept informed

[2] Hearings before the Committee on Un-American Activities, House of Representatives, 85th Cong., 2d Sess., entitled "Investigation of Communist Infiltration and Propaganda Activities in Basic Industry (Gary, Ind., Area)." This document, which is hereinafter referred to as "Hearings," constitutes Gov. Ex. 15.

and thus prepared to enact remedial legislation in the national defense and for internal security when and if the exigencies of the situation require it.

2. Execution by administrative agencies concerned of Public Law 637, of the 83rd Congress known as the "Communist Control Act of 1954", relating to the eligibility to exercise the rights and privileges provided under the National Labor Relations Act of labor organizations determined by the Subversive Activities Control Board to be Communist-infiltrated organizations. The legislative purpose is to assist Congress in appraising the administration of the Communist Control Act of 1954 and to enact such amendments thereto as the exigencies of the situation require.

3. Any other matter within the jurisdiction of the Committee which it or any subcommittee thereof, appointed to conduct this hearing, may designate.

Petitioner was subpoenaed to appear at the hearings in Gary on February 10, 1958. His counsel sent a telegram to the Committee's counsel on February 6, 1958, asking that petitioner be questioned in executive session because "[t]estimony needed for legislative purposes can be secured in executive session without exposing witnesses to publicity" (Def. Ex. 1). On that same date, the Staff Director of the Committee telegraphed petitioner denying the request (Def. Ex. 2).

Public hearings were held in Gary, Indiana, by a subcommittee on February 10 and 11, 1958. At the opening of the hearing on February 10, the chairman

of the Committee, in petitioner's presence (Hearings, p. 1977), read the above-quoted resolution of the Committee authorizing the hearings and explained at length the purpose of the hearings in Gary (*id.* at 1955–1957). The chairman stated, *inter alia*, that the subcommittee was "in Gary for the purpose of receiving testimony concerning Communist techniques and tactics of infiltration and the extent, character, and objects of Communist Party propaganda activities in basic industries"; that such an inquiry had great importance to internal security; that the hearing was intended as part of the Committee's "surveillance over existing security legislation," including the Internal Security Act, the Foreign Agents Registration Act, the Communist Control Act, and various espionage statutes "for the purpose of recommending any needed legislative amendments"; and that the Committee hoped to secure information useful in its consideration of H.R. 9352, an omnibus bill to amend the Internal Security Act of 1950, which was pending before it (*id.* at pp. 1956–1957).

Petitioner was present (Hearings, p. 1976) at the time John Lautner, the first witness at the hearing, testified (*id.* at pp. 1958–1974). Mr. Lautner, who was an organizer and high functionary in the Communist Party from 1930 to 1950, testified that in 1945 the Party condemned the "revisionist" policies which it had followed under its former leader, Earl Browder, and returned to the basic principles of Marxism-Leninism; that, after the Party was reconstituted, it re-established its policy of concentration

in basic industry; that as a result of this policy "colonization" was begun and Party "colonizers" were sent to all parts of the country to coordinate Party work in basic industries including the steel industry (*id.* at pp. 1964–1965); and that these colonizers were generally young Party members from colleges and universities who left to become "professional revolutionaries" (*id.* at p. 1967). Mr. Lautner further testified that (*id.* at p. 1968):

> Lenin said:
>
> > "It is necessary to be able to withstand all this, to agree to any and every sacrifice, and even—if need be—to resort to all sorts of devices, manoeuvres, and illegal methods, to evasion and subterfuge, in order to penetrate into the trade unions, to remain in them, and to carry on Communist work in them at all costs."
>
> This is the underlying principle on the basis of which these people [the colonizers] will deny their name, will deny their education, will deny everything, because that denial furthers the aims and objectives of the Communist Party. It would be a liability for him to be a worker in the mill if he has a college degree; it wouldn't look good. There would be immediately a suspicion of an ulterior motive in that, so they are carrying out a Leninist policy when they do that.

Petitioner, the second witness appearing on February 10, was questioned immediately after Lautner (Hearings, pp. 1974–1988). Petitioner answered preliminary questions as to his name and present residence. When the Committee chairman refused to

allow petitioner's counsel to read into the record the telegrams between himself and the Committee, petitioner's cousel stated that he would be satisfied if the record showed that the exchange of telegrams had occurred (*id.* at p. 1974). Petitioner then refused to answer the question, "Where did you reside prior to September, 1957?" (Count 1) (*id.* at pp. 1974–1975). He stated as his grounds for refusing to answer that the First Amendment forbids Congress to investigate opinions and beliefs; that the authorizing resolution of the Committee is so vague that it might deprive him of due process of law; and that the question was not pertinent to any legislation (*id.* at pp. 1976–1977). After petitioner was directed to answer the question, he explicitly stated that he relied on the First Amendment and not the privilege against self-incrimination (*id.* at p. 1977). Apparently in doubt whether petitioner was challenging the pertinency of the question to the subject under inquiry, the committee counsel ascertained that petitioner was present when the chairman made his opening statement which explained the purpose of the hearing and then stated (*id.* at p. 1977):

> This is a hearing which involves a subject described by the chairman, and it relates to Communist Party activities within the area of Gary. As far as pertinency of the question is concerned, as to which you seem to express some doubt, it would be impossible for us to learn anything from you regarding Communist Party activities in this area without ascertaining whether or not you were here for a period of time.

Petitioner then was again directed to answer the question and he again refused (*id.* at p. 1978).

Petitioner next was asked to state his formal education. He refused to answer because the question could serve no legislative purpose and violated his First Amendment rights (Hearings, p. 1978). When asked whether he was a student at the College of the City of New York for several years prior to 1948 he invoked the same grounds and said (*ibid.*):

> [I]f the committee knows all these things, I can't see the purpose or the pertinency of asking me what they consider a known fact. Furthermore, it kind of appears to me as if this line of questioning is merely trying to create an impression and expose me for the sake of merely exposing me and not leading to any valid legislative purpose.

The Committee chairman then assured petitioner that it was not the purpose of the question to expose him.

The Committee received in evidence copies of petitioner's college record showing that he transferred from the College of the City of New York to the University of Michigan and from the College of Literature, Science and Arts at the University of Michigan to its Engineering Department in 1948 (Hearings, pp. 1979, 1980–1981); it also received in evidence petitioner's application for employment at the Carnegie-Illinois Steel Corporation dated June 23, 1949, which left blank the line asking for the applicant's college education (*id.* at pp. 1982, 1983–1984). Petitioner refused to answer whether his name was at the bottom of the latter application, where he was residing on June 23, 1949, whether

he lived at a specified address in Gary at that time (as the application for employment said), whether he was ever employed at the Reo Motor Company in Lansing, Michigan (the application stated that petitioner had been employed at Reo from 1946 to February 1948), whether he had been employed by Modern Distributors from February 1948 to April 1948 (as the employment application showed despite the statement in the University of Michigan records that he was at the University from February 1948 until June 1949), whether he was employed by Reo from April 1948 to May 1949 (as the employment application also said), why he had failed to include on his employment application his education at the College of the City of New York or the University of Michigan, and whether "at the time you sought that employment in Gary, Indiana, in steel, you were doing it at the instance or under counseling from the Communist Party or leaders in the Communist Party" (*id.* at pp. 1982–1985). Petitioner refused to answer all these questions for the same reasons he had earlier stated.

Petitioner was then asked, "Will you tell the committee please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1957?" (Count 2) (Hearings, p. 1985). When petitioner refused to answer for the same reasons, the Committee counsel again explained the pertinency of the question (*id.* at p. 1986):

> It has been testified here that colonization of young men in the middle of their educational

courses in industry was a deep-seated plan of the Communist Party to strengthen itself within basic industry. The chairman's opening statement indicated that the activities of the Communist Party within basic industries was the subject of inquiry here.

* * * * * *

The statement was made here of the practice of the Communist Party in colonizing industry at Flint, Michigan; at the University of Colorado, which is at Fort Collins, Colorado, where you now reside; and other places.

In order to understand the full tactics of the Communist Party in its operations here in Gary, it is necessary the committee understand fully the extent of such practices, the full purposes of it, and the methods by which it is put into effect. That is the connective reasoning of the committee in asking the question.

On the grounds already stated, petitioner declined to answer whether he was a member of the Neafus Club of the Communist Party at the University of Michigan, whether he was acquainted with Francis X. T. Crowley at the University of Michigan, and whether Crowley was correct when he testified before the Committee in 1954 that petitioner has been a member with him of the Neafus Club (*id.* at p. 1987).

Petitioner refused, for the same reasons, to answer the question, "Were you a member of the Communist Party on the 23rd day of June, 1949, which is the date of application filed in your name for employment in Gary?" (Count 3) (Hearings, p. 1987). He similarly refused to answer whether he was active in the American Veterans Committee prior to June 1949, and

whether he was acquainted with Edward Shaffer of Pittsburgh. Petitioner was shown a copy of the *Detroit News* dated January 7, 1949, reporting that three students, including Edward Shaffer of Pittsburgh and petitioner, resigned from the University of Michigan Chapter of the American Veterans Committee after the Committee in its annual convention adopted a resolution calling for the ouster of members belonging to the Communist Party. Petitioner refused to answer whether this report was correct (*id.* at pp. 1987–1988). He then declined to answer, "Will you tell the committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party" (Count 4) (*id.* at p. 1988). Finally, petitioner refused to answer three more questions: whether he was a member of the Communist Party in August 1957; what stand did the Party take in Gary regarding the acts of the Soviet Union in Hungary in 1956; and whether he was at the time of the hearing a member of the Communist Party (*ibid.*).

Later on February 10, the subcommittee heard the testimony of Joseph LaFleur, who worked in the steel industry in Gary and had joined the Communist Party at the request of the FBI. He discussed at length Communist activities in the Gary area and in the steel industry in particular. Mr. LaFleur described petitioner as one of several well-educated, young Party members who had come to Gary to help organize Party activities in the steel mills (Hearings, pp. 2016–2017). Subsequently, the Committee asked two other wit-

nesses who worked in the steel industry whether they were acquainted with petitioner. Both refused to answer this question, as well as numerous other questions concerning Communist activities, on the basis of the First Amendment (*id.* at pp. 2055, 2063).

2. At petitioner's trial, the government's sole witness was Frank S. Tavenner, counsel for the Committee, who was present at the Gary hearings and interrogated petitioner. He testified that the purpose of the hearings was "to find out how serious the Communist propaganda activities and infiltration were in basic industry, particularly with regard to the steel industry in this area" (R. 18); that the reason that the Committee wanted the information was that it had held a series of meetings on this subject in Baltimore, Youngstown, Ohio, and other places, and the Committee was of the opinion that it might be necessary to amend various acts of Congress to "tighten up laws with regard to Communist activities in this field" (R. 18); and that the Committee considered the steel industry to be the most important basic industry in the country, and Gary, Indiana, was one of the centers of the steel industry (R. 25).

Tavenner further testified that members of the Committee introduced several bills around the time of these hearings relating to the internal security field:

H.R. 2369, sponsored by Congressman Walter, the Chairman of the Committee and of the subcommittee holding the hearings in Gary, to redefine the term "organize" as used in the Smith Act so as to include continuing acts of organizing (R. 27);

The Defense Facilities Protection Act of 1959, introduced by Congressman Scherer (who was one of the members of the subcommittee holding the hearings in Gary), to permit the federal government to guard strategic defense facilities against espionage, sabotage, and other subversion (R. 23);

H.R. 9352, an omnibus bill introduced by Congressman Walter to amend the Internal Security Act of 1950 (Gov. Ex. 14; R. 23–24);

H.R. 8121, a bill to amend the Subversive Activities Control Act of 1950 by authorizing the Secretary of Defense to provide for a security program with respect to defense contractors and their employees (Gov. Ex. 18; R. 65).

Tavenner stated at the trial that prior to calling petitioner the Committee had information that petitioner was a member of the Communist Party while at the University of Michigan in 1949; that he had previously attended City College of New York; and that he had filed an application for employment in 1949 at the Carnegie-Illinois Steel Corporation in Gary, Indiana, in which he failed to set out his college and university education (R. 34–35). Tavenner testified that the Committee wanted to find out from petitioner what knowledge he had of the execution of the Communist Party's plan to colonize the steel industry (R. 35).

On cross-examination, Tavenner stated that it was the practice of the Committee to interview prospective witnesses before subpoenaing them "if there is any chance in the world of obtaining co-operation

from them" (R. 53). Petitioner was not interviewed since he was then in Denver. Tavenner admitted, however, that if petitioner had been in Gary, he probably would not have been interviewed, even though the Committee did not know whether he would cooperate, since the Committee had information that he was a member of the Communist Party (R. 53, 58, 62). Tavenner emphasized that the Committee subpoenaed petitioner to testify with the hope he would cooperate (R. 52–54) and inform the Committee whether he had concealed facts on his employment application "pursuant to a Communist Party plan to colonize [the steel] industry, and the extent to which that colonization was progressing" (R. 53). Tavenner explained that the Committee believed that petitioner had information which had not been presented by any of the witnesses at the Committee's previous hearings on the Party's industrial concentration program (R. 55):

> We knew nothing about the actual activities of the Communist Party in the steel plants in Indiana as of the time of this hearing, or shortly before. Mr. LaFleur, who did testify [at the Gary hearings], according to my recollection got out of the Communist Party in 1950.[3] This witness, Mr. Yellin, as to whom we had testimony by several people, had been a member of the Communist Party at Michigan University, and had left there and come down and taken employment in Gary.

[3] Joseph LaFleur testified that he left the Party in 1952 (Hearings, p. 2013).

Tavenner later testified (R. 57):

> Now, with that information relating to Mr. Yellin, we felt certain that Mr. Yellin was in a position, if he would do so, to tell this Committee a great many things regarding the plan of the Communist Party to infiltrate the steel industry here, and to building up the Communist Party from its grass roots level, and just what the Communist Party plans were to make these bright young men leaders who did this thing of colonizing.

Representative Walter, the chairman of the Committee and of the subcommittee that conducted the hearings in Gary, was called to testify by petitioner. Mr. Walter stated that he did not know of petitioner's telegram asking for an executive session until after the public hearing in Gary started, since it was not addressed to him and he had left Washington for Gary by the time the telegram arrived; that neither the Committee counsel, to whom the telegram was addressed, nor the Committee staff director, who sent the telegram refusing to hear petitioner in executive session, had the authority to pass on such a request (R. 68–69); that at the time petitioner's counsel attempted to introduce the telegrams at the hearings, "it was too late then to raise any question that might have been raised by the telegram" for "the Committee [had] already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable * * *" (R. 69–70). When asked what considerations the

Committee used in determining whether to hold an executive session, Congressman Walter testified (R. 82):

> This is usually done when the Committee is fearful lest a witness will mention the name of somebody against whom there is no sworn testimony, and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy, at least that there isn't sworn testimony to that effect, we have an executive hearing.

As to the Committee's purpose in subpoenaing petitioner, Congressman Walter stated that "[we] concluded that this would be a fine witness for the Committee in support of proposed legislation having to do with colonization, and, two, having to do with the protection of our defense efforts. And it is always worth a chance that somebody will testify" (R. 70). While Congressman Walter admitted that many witnesses refuse to testify, "occasionally we are very pleasantly surprised by having somebody give us information that is of great value in the drafting of legislation" (R. 82).

Petitioner called Professor Thomas I. Emerson of Yale to testify as an expert on the factors which should be considered by the district court in balancing the public and private interests in order to determine whether petitioner's First Amendment rights had been violated. The court ruled that this testimony was not admissible because it was opinion evidence on questions of law (R. 98–100, 116). Professor Emerson's testimony was then heard as an offer of proof (R. 99–115).

SUMMARY OF ARGUMENT

I

The Committee's use of compulsory process to obtain testimony from petitioner in aid of its investigation of Communist activities in basic industry and particularly in the steel industry, in the Gary, Indiana, area was a valid exercise of Congressional power that did not violate the First Amendment. Petitioner's basic contentions on this point, as he himself admits, have been answered by this Court in *Barenblatt* v. *United States,* 360 U.S. 109, *Wilkinson* v. *United States,* 365 U.S. 399, and *Braden* v. *United States,* 365 U.S. 431. There, the Court held that, in circumstances comparable to the present case, Congressional investigation of Communist activities has a valid legislative purpose and committees conducting such investigations may compel witnesses to testify concerning their Commmunist activities without violating their rights under the First Amendment.

A. Congress has power to require testimony, not otherwise privileged, in aid of an investigation into any proper subject of Congressional legislation. This power was first exercised by Parliament, and was carried over to the colonial and then state legislatures. Congress has exercised the power since 1792, and this Court, beginning in *Anderson* v. *Dunn,* 6 Wheat. 204, has approved it.

B. Congress has found on the basis of detailed investigations, such as the one involved here, that a foreign government controls the world Communist movement; that it establishes organizations designed to overthrow existing governments by force if necessary and to establish in their place totalitarian dictatorships subservient to that foreign government; and that Communists seek to gain control of labor unions in order to use their power for conspiratorial purposes. On the basis that such findings were, at least, not unreasonable, this Court has upheld the constitutionality of Congressional legislation concerning Communist activities in labor unions (*American Communications Ass'n* v. *Douds*, 339 U.S. 382), as well as numerous additional statutes punishing or regulating Communist activities, against attack under the First Amendment and other provisions of the Constitution. These cases establish that legislation safeguarding the internal security against subversive activities by the Communist Party in the steel industry would be a proper subject of Congressional legislation under the power granted by Article 1, Section 8, of the Constitution. *A fortiori*, Congress could constitutionally investigate an area where legislative action would be proper.

C. The use of compulsory process to secure testimony from petitioner concerning Communist activities believed to endanger the internal security did not violate the First Amendment.

1. This Court, in *Barenblatt*, 360 U.S. at 127, 128, and *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 80, emphasized that the governmental interest involved in investiga-

tions of Communist activities was "the right of self-preservation, the 'ultimate value of any society.'" In *Barenblatt, Braden,* and *Wilkinson,* that prerequisite was applied to uphold a Congressional investigation concerning the general nature of the Communist conspiracy as reflected in education and in propaganda. In this case, the governmental interest is manifestly stronger, for here the investigation was into Communist activity in the crucial area of the basic steel industry, in which political strikes or sabotage could seriously endanger the internal security.

2. There was every reason to believe that petitioner could furnish pertinent and valuable information. The Committee had information that he was a long-time Party member who had actively participated in the Party's organization of the steel industry. Moreover, it is beyond dispute that the questions petitioner refused to answer sought relevant information concerning the legislative purpose of the hearings. Indeed, one of the questions concerning petitioner's membership in the Communist Party at a particular time—which is in itself sufficient to sustain the conviction—was virtually identical to questions upheld by this Court in *Barenblatt, Wilkinson,* and *Braden.*

Petitioner contends that the Committee had no governmental interest in questioning him because it had all the information concerning Communist activities which petitioner could have supplied. Even if, however, the witness had no new information, there is a strong governmental interest in having the witness corroborate previous testimony—particularly since the existing evidence is in a controversial area and is

therefore likely to be challenged. In addition, while the Committee had conducted hearings on Communist activities in the steel industry in other localities, it had conducted no such investigation on the related, but distinct, subject of Communist activities in the steel industry in Gary, Indiana. There is no evidence in the record that petitioner could not have provided valuable information on this subject. Petitioner could not bind the Committee by his unilateral determination—made by comparing his own knowledge which he has not disclosed with the information possessed by the Committee—that he could supply no new information.

Finally, in this case, petitioner's claim of prejudice to fundamental freedom is considerably weaker than in *Barenblatt, Wilkinson,* and *Braden.* Those cases involved the sensitive areas of education, propaganda, and, according to the defendants, political opposition. Here, on the other hand, petitioner was called to testify concerning Communist infiltration of the critically important steel industry.

D. The Committee in this case clearly had a proper legislative purpose, *i. e.,* the investigation of Communist activities in the steel industry, and was not merely attempting exposure for the sake of exposure. The authorizing resolution and opening statement of the chairman specifically referred to legislation in that area which the Committee was considering. Moreover, this Court has repeatedly held that the courts have no power to inquire into the motives of committee members. But, even if this power existed—as the dissents in several cases have suggested—there is not the slightest indication in this record that the purpose of the Committee was to expose petitioner.

II

The trial court properly excluded the testimony of Professor Emerson concerning petitioner's claim that his rights under the First Amendment had been violated. The questions asked Professor Emerson sought his "opinion" "as to the various factual considerations which have to be taken into account in balancing the competing public and private interests at stake." Professor Emerson's answer principally described what legal factors the courts should consider and what weight should be given to each of these factors; it was not factual information for the court to consider. While this statement could properly be presented as legal argument, the trial court correctly held that it was not evidence.

Even if, however, Professor Emerson's statements were properly admissible, petitioner's conviction should still be sustained. The statement was offered solely in relation to the First Amendment issue, which was a question of law. Since the entire statement is in the record, it can properly be considered by this Court. Professor Emerson, however, added little to the basic contentions already considered by this Court in the *Barenblatt, Wilkinson,* and *Braden* cases. Therefore, we submit that here, as in those cases, the Congressional investigation of Communist activities did not violate the First Amendment.

III

Petitioner contends that the statute under which he was convicted is unconstitutionally vague. Peti-

tioner, however, was convicted of violating 2 U.S.C. 192, the contempt-of-Congress statute and this Court has repeatedly upheld convictions under that statute. The argument is in reality aimed, not at the statute under which petitioner was convicted, but at the House resolution authorizing the Committee. House Rule XI is, of course, not a criminal statute, and therefore this Court has never construed it as one. The Court has three times held that House Rule XI is sufficiently clear to authorize the Committee to compel testimony in an investigation into Communist activities. *Barenblatt* v. *United States, supra,* 360 U.S. at 117; *Wilkinson* v. *United States, supra,* 365 U.S. at 409; *Braden* v. *United States, supra,* 365 U.S. at 433.

IV

Rule IV–A of the Committee's rules did not require that petitioner's request to appear at an executive session be granted Rule IV–A provides that a witness may be heard in executive session whenever "a majority of the Committee * * * believes that the interrogation of a witness in a public hearing might * * * injure his reputation." Clearly, this rule does not give a witness a right, upon request, to appear at an executive session; instead, the rule leaves it to the discretion of a majority of the Committee whether to interrogate the witness in executive session. The evidence here showed that the Committee had considered the matter and decided that petitioner should not be called in executive session. Even if Rule IV implicitly provided for judicial review—which we do not

think it does—there is nothing in this record to suggest that the Committee abused its discretion.

V

Petitioner contends that the questions involved in Counts 2 and 4 are too vague to meet the requirements of the Sixth Amendment and Rule 7(c) of the Federal Rules of Civil Procedure. However, even if this contention were valid, the conviction must be sustained since petitioner was given concurrent sentences on all four counts. Morover, petitioner is precluded from raising this issue because it was not presented in his petition for a writ of certiorari. Rule 40(1)(d)(2) of the Rules of this Court.

In any event, the Sixth Amendment and Rule 7(c) require that "[t]he indictment * * * be a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c)), so that the accused can adequately defend himself and prevent a second prosecution for the same offense. The indictment clearly stated all the elements of the offense, including the questions which petitioner refused to answer. The fact that the indictment did not spell out the meaning of the questions did not prejudice petitioner since no possible defense turns on their meaning except that the reason petitioner had not answered the questions is that he did not understand them. But that issue—which petitioner specifically refuses to claim—depends on whether the witness understood the question at the time he refused to answer before the Committee; it would do no good, on that issue, to explain the question subsequently in the indictment.

ARGUMENT

Petitioner was convicted for refusing to answer four questions asked him by a Congressional committee during an investigation of Communist activities in basic industry, and particularly in the steel industry, in the Gary, Indiana, area.* Two of these questions—where he resided prior to September 1957 (Count 1), and whether he was a Party member on June 23, 1949 (Count 3)—concerned only his own Party activities. The other two questions—whether he knew of Party colonization in the steel unions in Gary before 1957 (Count 2) and whether there were Party colonizers in the steel unions in Gary in 1957 (Count 4)—concerned the Party activities of other persons but did not require the divulgence of their identity. Since petitioner was sentenced to serve concurrent terms of imprisonment and to pay a fine which was less than the maximum authorized by the statute under any one count, the judgment below must be affirmed if petitioner's refusal to answer any one of the questions was unlawful. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115.

I

THE COMMITTEE'S USE OF COMPULSORY PROCESS TO OBTAIN TESTIMONY FROM PETITIONER IN AID OF ITS INVESTIGATION OF COMMUNIST ACTIVITY IN THE BASIC STEEL INDUSTRY WAS A VALID EXERCISE OF CONGRESSIONAL POWER THAT DID NOT VIOLATE THE FIRST AMENDMENT

In *Barenblatt* v. *United States,* 360 U.S. 109, this Court squarely held that the use of compulsory proc-

* The indictment contained five counts, but Count 5 was dismissed on motion of the government (R. 11).

ess in aid of Congresssional investigations of Communist activities in circumstances comparable to the present case has a valid legislative purpose, and that the use of compulsory process to require witnesses to give testimony concerning Communist activities in aid of such an investigation does not violate the First Amendment. The holding was reaffirmed in *Wilkinson* v. *United States*, 365 U.S. 399 and *Braden* v. *United States*, 365 U.S. 431. Petitioner himself admits (Pet. Br. 14–15, 34) that the case at bar is indistinguishable, and that the precedents cited therefore dispose of his basic contentions that the Committee's action violated rights under the First Amendment.

It is scarcely necessary to recall that the process of decision according to law depends in considerable measure upon the weight accorded to prior decisions made by the court of last resort after full argument and deliberation. The decisions in *Barenblatt*, *Wilkinson*, and *Braden* are neither sports nor outmoded precedents based upon conditions or factual assumptions that time has altered or disproved. The underlying principle, that Congress is exercising an inherent power to investigate, and does not violate the First Amendment in merely requiring a witness to testify concerning subversive Communist activities, is in keeping with the full sweep of our constitutional history; it is sustained, as we shall show, by a score of related precedents resting upon the same hypothesis concerning the nature of the Communist conspiracy. The specific rule in question was laid down after full

deliberation in 1959 and reaffirmed in 1961. It is now settled constitutional law.

Under normal circumstances, therefore, and perhaps in the present instance, it would be enough to show that the case at bar is indistinguishable from the controlling precedents. We are mindful, however, that the present controversy involves the most delicate and dangerous of the Court's responsibilities—a review of the manner in which the Congress, an equal and coordinate branch of government, has performed one of its own Congressional functions. The dangers of collision which led the Court invariably to exercise deference and self-restraint in passing upon the constitutionality of legislation are multiplied when the Court is asked to review the legislative process itself, for any judicial review of the functioning of Congress, necessary as it may be under our constitutional system, not only intrudes into the sensitive area of Congress' internal affairs but affects its ability to legislate intelligently. For these reasons, we would be derelict in our duty, despite the precedents, if we failed to show in some detail the constitutional foundation for the Congressional investigation into Communist activities in the basic steel industry, during the course of which the Committee asked petitioner the pertinent questions that he refused to answer.

A. CONGRESS HAS POWER TO REQUIRE TESTIMONY, NOT OTHERWISE PRIVILEGED, IN AID OF AN INVESTIGATION INTO ANY PROPER SUBJECT OF CONGRESSIONAL LEGISLATION

In *Watkins* v. *United States*, 354 U.S. 178, in the course of an admirable restatement of the extent

and limits of the Congressional power of investigation, the Chief Justice wrote (*id.* at 187):

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. * * * But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.

This inherent power to compel testimony in aid of *bona fide* investigations extends to any subject upon which Congress has power to legislate.

In the Anglo-American tradition the power was first exercised by the British Parliament. Early in the sixteenth century and particularly after the Revolution of 1688 established the supremacy of Parliament, Parliament as a whole, or one of its many committees, conducted investigations compelling the production of persons or papers during its investigations. See Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harv. L. Rev. 153, 159–164. These powers were carried over to the United States both in the colonial, and later State, legislatures; indeed, Professor Landis says that until 1880 no State court had denied or even curtailed the power of the State legislatures to investigate. *Id.* at 165–166. The basis of this power in the United States was aptly summarized by a New York court (*Briggs v. MacKellar,* 2 Abb. Pr. 30, 56–57 (1855):

> It is a well-established principle of this parliamentary law, that either house may institute any investigation having reference to * * * any matter affecting the public interest upon which it is important that it should have exact information, and in respect to which it would be competent for it to legislate. The right to pass laws, necessarily implies the right to obtain information upon any matter which may become the subject of a law. It is essential to the full and intelligent exercise of the legislative function * * *. In American legislatures the investigation of public matters before committees, preliminary to legislation, or with the view of advising the house appointing the committee, is, as a parliamentary usage, as well established as it is in England, and the right of either house to compel witnesses to appear and testify before its committees, and to punish for disobedience, has been frequently enforced.

The power of Parliament to investigate was also carried over to the Congress.[5] At the time of the constitutional convention, legislative power in common-law countries included the power to form investigative committees authorized to send for persons and papers. This was the practice in numerous Congres-

[5] In *Kilbourn* v. *Thompson*, 103 U.S. 168, 189, this Court said that the history of investigations by Parliament was not relevant to Congress' powers since Parliament had both judicial and legislative powers and that its investigations were carried out under the former power. However, Professor Landis has shown that, by the time Parliament conducted investigations, it had only legislative powers and that therefore Congress' powers can be traced back directly to the practices of Parliament. This position was accepted by this Court in *McGrain* v. *Daugherty*, 273 U.S. 135, 161.

sional investigations beginning as early as 1792 and continuing through the Civil War. Landis, *supra*, pp. 168–191. And, of course, since the Civil War, Congress has increasingly relied on investigations using compulsory process to determine whether and how it should legislate.

Until after World War II, the courts rarely ruled on the power of Congress to investigate, for the power was seldom challenged. See Landis, *supra*, p. 212. As early as 1821, however, in *Anderson* v. *Dunn*, 6 Wheat. 204, this Court sustained the power of the Speaker of the House to convict a person for attempting to bribe a member. The Court held that this power was necessarily implied in order for the legislative power to operate (*id.* at 226–227):

> But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers.

In *Kilbourn* v. *Thompson*, 103 U.S. 168, however, the Court imposed an important limitation. There, a witness was arrested by the House for refusing to answer questions asked by a committee which was investigating a real estate pool, the bankruptcy of Jay Cooke & Co., and the resulting losses to numerous

creditors including the United States. The Court did not find it necessary to decide whether Congress had the power to investigate as part of its legislative function. For the Court held that the investigation was not into the administration of the government (it had deposited money with Jay Cooke & Co.) or into the need for new legislation, but rather into the "private affairs of individuals." *Id.* at 195. This subject was already before a federal court in a bankruptcy proceeding, and the Court held that Congress has no judicial power to conduct a similar proceeding.

While *Kilbourn* v. *Thompson* furnished an important counterpoise to the *Anderson* case by making it plain that the power of Congress is not to prosecute, expose, or put on trial, nothing in that decision cast doubt upon the power of Congress to investigate in aid of a legislative purpose.[6] The later decisions confirm the power and emphasize its breadth.

In *In re Chapman*, 166 U.S. 661, the Court sustained the power of a Senate committee to require a witness to testify concerning the allegedly corrupt influences attempted to be exerted during the Senate's consideration of a tariff bill. This decision also upheld the constitutionality of Section 102 of the Revised Statutes—the

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[6] Insofar as *Kilbourn* may suggest a strict and unfriendly interpretation of the purpose of a Congressional investigation or a niggardly view of the constitutional power to investigate, we submit that this decision is no longer the law. Thus, the Court in *United States* v. *Rumely*, 345 U.S. 41, 46, characterized *Kilbourn* v. *Thompson* as having included "loose language," as having been subjected to "weighty criticism," and as having been eroded by the later decisions in *McGrain* v. *Daugherty*, 273 U.S. 135, and *Sinclair* v. *United States*, 279 U.S. 263. See also Landis, *supra*, pp. 214-220.

predecessor of the statute under which petitioner was convicted (2 U.S.C. 192)—which gave the federal district courts power to punish for contempt of Congress. The Court stated that a house of Congress could investigate any matter within its jurisdiction. *Id.* at 667, 671.

During the 1920's, the Court decided the leading cases dealing with the investigatory powers of Congress.[7] In *McGrain* v. *Daugherty*, 273 U.S. 135, the Senate was holding a witness in custody, pending trial before the Senate itself, for refusing to appear before a committee investigating the administration of the Department of Justice. The Court held that a house of Congress has the power to compel witnesses before one of its committees, to give testimony needed to legislate, and to punish the witness for contempt if he refuses to comply. Relying on the history of investigations by Parliament, the colonial and State legislatures, and Congress itself, statutes enacted by Congress, and numerous decisions by State courts (*id.* at 161–168, 174), the Court stated that "[i]n actual

[7] The only intervening case of any relevance is *Marshall* v. *Gordon*, 243 U.S. 521. A United States Attorney after appearing before a House committee investigating his conduct, had written a letter which was defamatory and insulting to the House as a whole. The House convicted him of contempt. This Court, on petition for a writ of habeas corpus, held the conviction invalid. The basis for the Court's decision was its conclusion that the conviction constituted punishment for writing the letter, not for obstruction of Congress' legislative responsibilities. *Id.* at 545–546. The Court said that the implied power to punish for contempt extends only to actions which actually obstruct Congress, such as "contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel." *Id.* at 543.

legislative practice power to secure needed information by [investigation] has long been treated as an attribute of the power to legislate" (*id.* at 161) and that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function" (*id.* at 174). The Court reasoned (*id.* at 175):

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

In response to an argument that the purpose of the investigation was not in aid of legislation, the Court answered that "the subject was one on which legislation could be had" and that, in the absence of con-

trary evidence, "the presumption should be indulged that this was the real object." *Id.* at 177, 178. It quoted with approval a decision of the New York Court of Appeals (*People* v. *Keeler*, 99 N.Y. 463, 487) that "[w]e are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed * * *." *Id.* at 178.

In *Sinclair* v. *United States*, 279 U.S. 263, a witness was convicted of contempt in a federal district court for refusing to answer questions asked by a Senate committee investigating the Teapot Dome scandal. The Court, in sustaining the conviction, repeated its holding in the *Daugherty* case that Congress has the power, as part of its legislative function, to conduct investigations. *Id.* at 291. The Court stated that, under *Kilbourn* v. *Thompson*, Congress could not investigate purely private or personal affairs; similarly, the Court said, Congress could not compel disclosure in order to aid the prosecution of pending suits. However, if the investigation has a legislative purpose, the "constitutional power [to investigate] is not abridged because the information sought to be elicited may also be of use in such suits." *Id.* at 295. Accord, *Hutcheson* v. *United States*, 369 U.S. 599, 618.

Subsequent cases applied the same fundamental principles. In *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, the Court applied them to an investigation of corruption in a Senate election, saying that, "if judicial interference can be successfully invoked it can only be upon a showing of such arbi-

trary and improvident use of the power as will constitute a denial of due process of law." *Id.* at 620.[8] And in *Tenney* v. *Brandhove*, 341 U.S. 367, although the central holding was that members of a State investigating committee had an absolute privilege against liability under 8 U.S.C. 43, 47(3), the Court stated that "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.* at 378.[9]

Thus, the history of Parliament, of the State legislatures, and of Congress itself, and also the uniform decisions of this Court demonstrate the breadth of the power of Congress to conduct investigations, to compel the attendance of witnesses and the production of papers, and to punish disobedience as contempt. In a democracy these legislative powers arise out of necessity and are inherent in the legislative body. As Professor Landis has written (pp. 209–210):

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[8] *Jurney* v. *MacCracken*, 294 U.S. 125, involved a witness who destroyed records subpoenaed by a Senate committee investigating government air and ocean mail contracts. The Court upheld the power of the Senate to hold the witness, pending trial by the Senate, for contempt.

[9] In *United States* v. *Rumely*, 345 U.S. 41, the Court reversed a conviction for contempt on the ground that the resolution which authorized the committee to investigate lobbying activities did not encompass an investigation of efforts to influence the public generally. The Court construed the resolution narrowly to avoid a serious issue under the First Amendment, but did not resolve this issue. Of course, the First Amendment issue in *Rumely* did not involve the question whether Congress can constitutionally investigate Communist activities, the issue in this case.

Little need be said of the necessity for investigation where new problems are faced by Congress to be met with different devices for legal control. To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness. The use of committees for such purposes is, perhaps, most common. In 1892 the activities of the Pinkerton Detective Agency as strike breakers in the railroad troubles in the West, caused investigations to be conducted by both Senate and House. Such investigations have left major imprints upon legislation. The Court of Customs Appeals owes its origin thereto; restrictions upon the immigration of foreign contract labor followed upon the work of a House committee in 1889; the Transportation Act of 1920 followed in part the recommendations of the joint subcommittee of the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce, appointed by the Act of July 20, 1916. Whether existing legislation protects competing interests, whether governmental control should penetrate still further into fields of private endeavor, whether conditions are critical enough to demand legislative interposition—answers to such problems require knowledge. For its attainment Congress has appointed committees authorized to inquire and to demand all necessary information; it cannot escape in the future from employing the same device.

B. LEGISLATION SAFEGUARDING THE NATIONAL SECURITY AGAINST SUBVERSIVE ACTIVITIES OF THE COMMUNIST PARTY IN THE BASIC STEEL INDUSTRY WAS A PROPER SUBJECT OF CONGRESSIONAL CONSIDERATION UNDER THE LEGISLATIVE POWERS GRANTED IN ARTICLE I, SECTION 8 OF THE CONSTITUTION

When the Committee subpoenaed petitioner and questioned him concerning his alleged Communist activities and Communist Party membership, it was investigating an effort of the Communist Party to "colonize" the basic steel industry. According to testimony before the Committee, after the Party was reconstituted in 1945, it reestablished its policy of concentrating attention upon basic industry and, as part of the effort to secure this control, it sent educated young Party members from colleges and universities to work as laborers in industrial plants, including the steel mills, where, concealing their role as professional revolutionaries, they would expand the Party's influence and coordinate its activities. The program of colonization, the Committee had reason to believe, was part of the major Communist conspiracy.

The investigation was undertaken against a long background of Congressional findings concerning the direction and purposes of the Communist Party. In the Subversive Activities Control Act of 1950, Congress, on the basis of detailed investigations, found that there exists a world Communist movement, foreign controlled, whose purpose is to establish Communist totalitarian dictatorship, by whatever means necessary, in countries throughout the world. Section 2, 50 U.S.C. 781. It further found that in furthering these purposes the foreign government controlling

the world Communist movement establishes organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments by force if need be and to establish in their place totalitarian dictatorships subservient to that foreign government. In the Communist Control Act of 1954, the Congress found and declared (Section 2, 50 U.S.C. 841):

> that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. * * * [T]he policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement.

Also in the background of the Committee's investigation at Gary was a general awareness of the disruptive tactics of Communists in seeking to gain control of labor unions with a view to using the resulting power for conspiratorial ends. The Court summarized the evidence available in 1947 in *American Communications Association* v. *Douds*, 339 U.S. 382, 388–389:

> Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. * * *

> No useful purpose would be served by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

No one can seriously suggest that Congress has no power whatsoever to enact legislation designed to prevent a conspiracy dominated by an often hostile foreign power from infiltrating the basic steel industry as part of a program to overthrow the government by force and violence. The basic steel industry manifestly affects interstate commerce. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1. It has been found on numerous occasions that labor disputes in the industry created an emergency endangering the national defense. *United Steelworkers* v. *United States*, 361 U.S. 39. The power of Congress to enact appropriate legislation directed at preventing Communist control of the labor movement in interstate industries was sustained more than a decade ago in *American Communications Association* v. *Douds, supra.* See also *Osman* v. *Douds*, 339 U.S. 846. It would seem plain, too, that appropriate measures designed to prevent a foreign dominated

conspiracy from overthrowing the government by force and violence is not only an inherent sovereign power but an exercise of the Congressional duty to provide for the common defense.

There is no occasion to reconsider here the correctness, or even the reasonableness, of the conclusions reached by Congress upon the evidence available. The power of Congress to investigate cannot depend upon its ability to prove in advance the answer to the very question to be investigated. It is surely enough that Congress has cause to believe that there may be a condition calling for appropriate legislation, for the purpose of the investigation is to ascertain whether the condition in fact exists. In the face of history and current information, no one can seriously deny that Communist activities in the basic steel industry might be found deserving of legislative action.

Indeed, this Court has for a decade and a half consistently sustained legislation predicated upon the view that the activities of the Communist Party are not only disruptive of sound labor management relations but endanger the security of the United States. Some of the cases evoked differences of opinion within the Court, but none of the opinions, whether for the Court or in concurrence or dissent, suggest that the activities of the Communist Party are immune from legislation.

The initial case was *American Communications Association* v. *Douds*, 339 U.S. 382, where the Court had before it Section 9(h) of the National Labor Relations Act, which barred from using the facilities

of the National Labor Relations Board, any union whose officers had not filed non-Communist affidavits. In sustaining Section 9(h) the Court squarely held that Communist activity in the labor movement is a fit subject of Congressional concern. Mr. Justice Jackson's concurring opinion succinctly summarized the reasons for distinguishing the Communist Party from true political parties. "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system." 339 U.S. at 424. Its goal is *"to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate"* (italics in the original). *Id.* at 425. It "purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship." *Ibid.* It is "designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and overturn our system of free, representative self-government." *Ibid.* *"Violent and undemocratic means are the calculated and indispensable methods to attain* [its] *goal"* (italics in the original). *Id.* at 429. It is "a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed." *Id.* at 432. Each member "pledges unconditional obedience to party authority. Adherents are known by secret or code names.

They constitute 'cells' in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded." *Ibid.* It, moreover, "*alone among American parties past or present is dominated and controlled by a foreign government.* It is a satrap party, which, to the threat of civil disorder, adds the threat of betrayal into alien hands" (italics in the original). *Id.* at 427.

The next case was *Dennis* v. *United States*, 341 U.S. 494, where the Court upheld the constitutionality, as applied to officers of the Communist Party, of the provisions of the Smith Act, making it a crime for any person knowingly or willfully to advocate the overthow of the government of the United States by force or violence or to organize any group which so advocates or to conspire so to advocate.

The special problems caused by the activities of Communists have also been the subject of legislation dealing with aliens. In *Carlson* v. *Landon*, 342 U.S. 524, the Court sustained the constitutionality of a provision of the Immigration Act allowing the Attorney General in his discretion to hold in custody without bail, pending determination of their deportability, aliens who are members of the Communist Party. The Court stated that "[w]e have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists * * *." *Id.* at 535–536. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, held that

the provision of the Alien Registration Act of 1940 authorizing deportation of aliens because of membership in the Communist Party was constitutional, even as applied to aliens whose membership had ended before passage of the Act. In an opinion by Mr. Justice Jackson, the Court held that due process was not violated, partly because *"Congress received evidence* that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists" (emphasis added). *Id.* at 590.

Galvan v. *Press*, 347 U.S. 522, held that the provision of the Internal Security Act of 1950 for the deportation of any alien who has been a member of the Communist Party after entry is constitutional even as applied to an alien who had no knowledge that the Party advocated overthrow of the government. The Court stated that (*id.* at 529):

> [O]n the basis of extensive investigation Congress made many findings, including that in § 2(1) of the [Internal Security] Act [of 1950] that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

More recently, in *Flemming* v. *Nestor,* 363 U.S. 603, the Court upheld a provision of the Social Security Act terminating old-age benefits for aliens deported for membership in the Communist Party. In *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, the Court sustained the constitutionality of the registration provisions of the Internal Security Act of 1950 concerning "Communist action organizations" against attack under the First Amendment and other provisions of the Constitution. This holding was specifically based on Congressional investigations like that involved here, and on the findings concerning the Communist Party which resulted from such investigations. *Id.* at 96–97, 102. And in *Scales* v. *United States,* 367 U.S. 203, 228–230, the Court upheld the membership clause of the Smith Act.

This Court has also upheld State power in relation to Communist activities in the United States. In *Gerende* v. *Board of Supervisors,* 341 U.S. 56, the Court held unanimously that Maryland could require every candidate on the ballot to swear in an affidavit that he was not engaged in any attempt to overthrow the government by force and violence. In *Garner* v. *Board of Public Works,* 341 U.S. 716, the Court held that a city has power to require its employees to execute affidavits disclosing whether they were or had ever been members of the Communist Party. *Adler* v. *Board of Education,* 342 U.S. 485, similarly determined that a New York statute which makes

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any member of an organization advocating the overthrow of the government by force or violence ineligible for employment in the public schools was constitutional. In *Beilan* v. *Board of Public Education*, 357 U.S. 399, and *Lerner* v. *Casey*, 357 U.S. 468, the Court found that State officials could question employees about their Communist affiliations and discharge them if they refused to answer. And in *Konigsberg* v. *State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, this Court held that a State could constitutionally deny admission to the Bar to applicants who refused to answer questions pertaining to membership in the Communist Party. Mr. Justice Harlan said that "[t]his Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes." 366 U.S. at 52.

The foregoing cases involved constitutionality of enacted legislation aimed at the subversive activities of Communists and the Communist Party. In most instances the decisions were by a divided Court, but we are not here concerned with the merits. In almost every instance, the legislative action was based upon a finding that the relevant activities of the Communist Party presented threats to the national welfare or security, and this Court's decision was based upon the view that that Congressional finding was not impermissible. The investigation that gave rise to citation of petitioner for contempt can be deemed outside the power of Congress only if it is held that no legislation upon the subject of Communist activi-

ties in the basic steel industry could be devised that Congress had power to enact. Such a holding would overturn the fundamental predicate of a decade of decisions by this Court.

A fortiori the earlier legislation and judicial opinions demonstrate that there was at least a reasonable foundation for believing that the activities the Committee was investigating might be found disruptive of labor conditions in the steel industry and dangerous to the national security. The point bears directly not only upon whether Congress had a legislative purpose but also, as we now show, upon the justification for any interference that the investigation might cause with freedom of political activity and expression. For it necessarily follows that, if Congress can legislate concerning Communist activities generally, and in the steel industry in particular, it can conduct investigations upon which to base legislation.

C. THE USE OF COMPULSORY PROCESS TO SECURE TESTIMONY CONCERNING ACTIVITIES OF THE COMMUNIST PARTY BELIEVED TO ENDANGER THE NATIONAL SECURITY BY "COLONIZATION" OF THE BASIC STEEL INDUSTRY DID NOT VIOLATE THE FIRST AMENDMENT

In exercising its broad powers of investigation Congress is subject to the restrictions imposed by the Bill of Rights upon all federal governmental activity. The Fifth Amendment privilege against self-incrimination has been frequently invoked and recognized. *E.g., Quinn v. United States*, 349 U.S. 155. In addition, "an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. * * * The First Amendment may

be invoked against infringement of the protected freedoms by law or by lawmaking." *Watkins* v. *United States*, 354 U.S. 178, 197. But here, as in *Barenblatt* v. *United States*, 360 U.S. 109, *Uphaus* v. *Wyman*, 360 U.S. 72, *Wilkinson* v. *United States*, 365 U.S. 399, and *Braden* v. *United States*, 365 U.S. 431, the Committee violated no rights guaranteed by the First Amendment.

Initially, we point out that a completely literal reading of the First Amendment would utterly destroy petitioner's argument. Petitioner is not complaining of a "law" but of compulsion to answer questions. He is not complaining that Congress has directly abridged his right to speak or punished him for its exercise. Petitioner, if he had testified, would have remained as free as ever from any form of legal restriction upon political activities or other forms of expression. His complaint is that the disclosure of views and activities that are unorthodox, unpopular, or even hateful to the general public, may subject him and others whom he names to public stigma, scorn, and obloquy, thus discouraging them and others from adhering to unpopular views lest they suffer such a fate in the future. Although, as held in *Watkins* v. *United States*, *supra*, these consequences are enough to raise questions under the First Amendment, it plainly requires something more than a literal reading of the words to hold that the amendment gives protection against indirect and collateral consequences resulting from the non-governmental activity of private persons. Furthermore, whatever may be the merits as an original matter of the "balancing test"

when dealing with a law which itself directly abridges freedom of speech or the press, questions of judgment and degree have to be faced in dealing with governmental activity which affects freedom of expression only because of indirect and collateral consequences."[10] It would hamstring government to hold that neither Congress nor the Executive may take any action, regardless of the need, which elicits any private response putting any pressure upon any person in his views or expressions. As the Chief Justice said in *Watkins*, 354 U.S. at 198:

> It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. * * * The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from any unwilling witness.

And in *Barenblatt* v. *United States*, 360 U.S. 109, 126–127, the Court held:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public in-

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[10] With deference to the dissenting opinion of Mr. Justice Black in *Barenblatt* v. *United States*, 360 U.S. 109, 134, 141–142, we submit that questioning a witness, not in reprisal for anything he has said, is an exact parallel of the "cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct." Id. at 141. Such cases include *Kovacs* v. *Cooper*, 336 U.S. 77, 85–89; *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Lovell* v. *Griffin*, 303 U.S. 444, 451; *Thornhill* v. *Alabama*, 310 U.S. 88, 104, 106.

terests at stake in the particular circumstances shown.

1. The public interest to be served by petitioner's testimony was the need for information concerning putative subversive activities in a vital area in our national life—information that would be helpful not only in reviewing the effectiveness of existing legislation but also in determining what new legislation might be needed to meet existing or threatened evils. The hearing at which petitioner was questioned was conducted for the explicit purpose of securing information about the "extent, character, and objects of Communist infiltration and Communist Party propaganda activities in the Gary, Indiana, area" for the legislative purposes, among others, of considering a proposed amendment to Section 4 of the Communist Control Act, 50 U.S.C. 843, and possible amendments to the provisions of that Act relating to the use of the National Labor Relations Board by Communist-infiltrated labor organizations (for the text of the resolution authorizing the hearings, see *supra*, pp. 3–4).

The principal basic industry in Gary, Indiana, is the production of steel. The basic steel industry is vital to the health of the economy and the national defense. It has been the subject of numerous Congressional investigations.[11] Its industrial relations are

[11] Temporary National Economic Committee, Investigation of Economic Power, Price Discrimination in Steel, Monograph No. 41, 76th Cong., 3d Sess.; Hearings on Administered Prices, Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, Oct.–Nov. 1957, 85th Cong., 1st Sess.; Hearings, Subcommittee on the Study of Monopoly Power, House Committee on the Judiciary, 81st Cong., 2d Sess., Serial No. 14, Pt. 4A, *Steel*.

not only regulated by the National Labor Relations Act but have been repeatedly considered by national boards and commissions.[12] On several occasions labor disputes in the basic steel industry have been found to create emergencies affecting the national defense.[13] The establishment of Communist Party cells among steel workers, the capture or disruption of *bona fide* labor unions, the use of professional revolutionaries to secure positions of leadership by treachery and deception in aid of a foreign power were obviously matters of grave national concern.

The reality of these dangers and the disruptive effects of Communist influence in labor unions is shown by industrial history. We have already adverted to the mass of material available in 1947 showing Communist infiltration of labor organizations not to support and further trade union objectives but to make them a device for disrupting commerce and industry whenever the dictates of "political policy" should so require (see *supra*, pp. 37–38). For example, the Amalgamated Clothing Workers Union had been torn by its successful fight against Communist infiltration. And later, in 1949 and 1950, the Congress of Industrial Organizations found it necessary to expel eleven international unions because of

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[12] *E.g.*, U.S. Steel Industry Board, Report to the President on the Labor Dispute in the Basic Steel Industry (1949); National Labor Relations Board, Directive Orders and Opinions in the Little Steel Case (1942).

[13] *United Steelworkers* v. *United States*, 361 U.S. 39, 42; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579.

Communist domination under which purported trade unionism was subverted to the aims of an international conspiracy.[14] For example, the committee which recommended expulsion of the United Mine, Mill and Smelter Workers Union stated (*Official Reports on the Expulsion of Communist Dominated Organizations from the CIO,* compiled by the Publicity Department, CIO (Sept. 1954), p. 13):

> The Communist Party is precisely this type of organization which the CIO is under a constitutional mandate to oppose—one which would use power to exploit the people for the benefit of an alien loyalty. The Communist Party speaks in the words of unionism and Americanism. But actually it matters not to the Communist Party whether a particular policy will advance or hinder the best interests of American labor. The sole test is whether the policy is required by the need of the Soviet Union. Only to the extent that the Soviet line permits will the propaganda mill of the Communist Party grind out platforms which are in consonance with the ideals of American labor. In event of conflict however, between the needs of the Soviet Union and the best interests of American labor, the former must always prevail.

The labor movement's alertness to its responsibilities strongly suggests that such problems can often be

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[14] United Electrical, Radio & Mechanical Workers; Farm Equipment Workers; American Communications Association; Food, Tobacco, Agricultural & Allied Workers Union of America; International Fishermen & Allied Workers of America; International Fur & Leather Workers Union; International Longshoremen's & Warehousemen's Union; International Union of Mine, Mill & Smelter Workers; National Union of Marine Cooks & Stewards; United Office & Professional Workers of America; United Public Workers of America.

better solved without legal intervention, but the possibility of a legislator's reaching that conclusion falls far short of demonstrating that the evil does not merit legislative consideration. Indeed, Congress chose to enact legislation in 1947[15] and 1954[16] aimed at reducing Communist influence in labor unions, and in 1959 it revised the 1947 legislation after 12 years of experience.[17]

The special problems posed by Communist activity among employees in basic industry make the public interest in this investigation particularly strong for upholding the exercise of Congressional power. In addition to the potential impact upon the critical steel industry, the same general public interest present in the *Barenblatt*, *Wilkinson*, and *Braden* cases—the right of self-preservation—is present here. Thus, in *Barenblatt* v. *United States*, *supra*, the Court sustained against attack under the First Amendment the interrogation of a witness concerning Communist activities in the field of education, saying (360 U.S. at 127-128):

> That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court. * * * In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society." *Dennis* v. *United States*, 341 U.S. 494, 509. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Com-

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[15] Act of June 23, 1947, 61 Stat. 143, 29 U.S.C. 159(h).

[16] Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. 792a.

[17] Act of September 14, 1959, 73 Stat. 536, 29 U.S.C. 504.

munist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

The weight to be assigned this public interest in acquiring knowledge of the working of the Communist conspiracy was emphasized in *Uphaus* v. *Wyman*, 360 U.S. 72, a case involving a witness before the Attorney General of New Hampshire, who was conducting an investigation on behalf of the State legislature. The witness was executive director of World Fellowship, an organization which ran a summer camp in New Hampshire. The witness refused to provide a list of guests of the camp, and was convicted of contempt. In upholding the conviction, the Court stated that the interest of the State was in the presence of subversives in New Hampshire; that the Attorney General "had valid reason to believe" that there was a "nexus between World Fellowship and subversive activities" and that the speakers and guests might be subversive persons; and that this nexus was adequate to justify the investigation since the investigation was undertaken "in the interest of self-preservation, 'the ultimate value of any society.'" 360 U.S. at 79–80. In contrast to the strong governmental interest, the Court found that the interest in associational privacy was "tenuous at best" because the camp was public, it was required to maintain a register open to police officers, and the only harm, public exposure, was "an inescapable incident of an investigation into the presence of subversive persons within a State." *Id.* at 80–81. In conclusion, the

Court stated, in upholding the conviction, that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy * * *." *Id.* at 81.

Subsequently, in *Wilkinson* v. *United States*, 365 U.S. 399, the Court sustained like questions in the course of a Congressional inquiry into Communist propaganda. Rejecting the witness' contention under the First Amendment, the Court held (*id.* at 413–414):

> The basic issues * * * were thoroughly canvassed by us in *Barenblatt*. Substantially all that was said there is equally applicable here, and it would serve no purpose to enlarge this opinion with a paraphrased repetition of what was in that opinion thoughtfully considered and carefully expressed.
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> * * * * *
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> The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organization by persons advocating overthrow of the Government. * * *

The same principle was restated in *Braden* v. *United States*, 365 U.S. at 435:

> But *Barenblatt* did not confine congressional committee investigation to overt criminal activity, nor did that case determine that Congress can only investigate the Communist Party itself. Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected

> activity. Communist infiltration and propaganda in a given area of the country * * * are surely as much within [the subcommittee's] pervasive authority as Communist activity in educational institutions. * * * Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in [the South] was surely not constitutionally beyond the reach of the subcommittee's inquiry. Upon the reasoning and authority of *Barenblatt*, 360 U.S. at 125–134, we hold that the judgment is not to be set aside on First Amendment grounds.

The lower courts have likewise repeatedly held that the First Amendment does not prohibit Congress from investigating Communist activities in search of information necessary in order to legislate. *E.g., Barsky* v. *United States*, 167 F. 2d 241, 246 (C.A. D.C.), certiorari denied, 334 U.S. 843; *Lawson* v. *United States*, 176 F. 2d 49, 52–53 (C.A. D.C.), certiorari denied, 339 U.S. 934; *United States* v. *Josephson*, 165 F. 2d 82, 90–92 (C.A. 2), certiorari denied, 333 U.S. 838; *Eisler* v. *United States*, 170 F. 2d 273 (C.A. D.C.), certiorari dismissed, 338 U.S. 883; *United States* v. *Orman*, 207 F. 2d 148, 157 (C.A. 3); *Marshall* v. *United States*, 176 F. 2d 473 (C.A. D.C.), certiorari denied, 339 U.S. 933; *Dennis* v. *United States*, 171 F. 2d 986 (C.A. D.C.), affirmed on other grounds, 339 U.S. 162; *Sacher* v. *United States*, 252 F. 2d 828 (C.A. D.C.), reversed on other grounds, 356 U.S. 576; *Townsend* v. *United States*, 95 F. 2d 352, 361 (C.A. D.C.), certiorari denied, 303 U.S. 664; *United States* v. *Lattimore*, 215 F. 2d 847, 851 (C.A. D.C.); *Morford* v.

United States, 176 F. 2d 54, 57 (C.A. D.C.), reversed on other grounds, 339 U.S. 258; *United States* v. *Kamin*, 136 F. Supp. 791, 803 (D. Mass.); *United States* v. *Bryan*, 72 F. Supp. 58, 62 (D. D.C.), reversed on other grounds, 174 F. 2d 525 (C.A. D.C.); reversed, 339 U.S. 323. No lower court, as far as we have been able to ascertain, has ever held to the contrary.

The public interest in Congressional knowledge of Communist activities is underscored by the numerous decisions of this Court based upon the premise that the dangers of Communist subversion in the particular areas involved, as found by Congress, furnished an adequate constitutional foundation for substantive legislation. *American Communications Association* v. *Douds*, 339 U.S. 382; *Osman* v. *Douds*, 339 U.S. 846; *Carlson* v. *Landon*, 342 U.S. 524; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Flemming* v. *Nestor*, 363 U.S. 603; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1; *Scales* v. *United States*, 367 U.S. 203. Upon the same premise the Court has upheld, against attack under the Fourteenth Amendment, State legislation, aimed at membership in the Communist Party, requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating the overthrow of the government by force and violence. *Gerende* v. *Board of Supervisors*, 341 U.S. 56; *Garner* v. *Board of Public Works*, 341 U.S. 716. See also *Beilan* v. *Board of Education*, 357 U.S. 399; *Lerner* v. *Casey*, 357 U.S. 468; *Adler* v. *Board of Education*, 342 U.S. 485. The proposition that there is sufficient pub-

lic danger in the activities of the Communist Party, as now constituted and directed, to justify legislative investigation and appropriate legislation is thus deeply embedded in our constitutional law. To hold that the First Amendment prevents mere Congressional inquiry into Communist membership or activities would not only overrule *Barenblatt, Braden,* and *Wilkinson* but reject a basic premise of the consistent line of decisions beginning with *American Communications Association* v. *Douds, supra.*

Of course, each case rests in a measure upon its own facts. We do not suggest that just because there is sufficient interest in legislative knowledge concerning Communist activities to justify an appropriate use of compulsory process, therefore it was automatically constitutional to question petitioner. One must also evaluate, we assume, the reasons for calling the particular witness, the relevancy of the information he could be expected to furnish, and the potential harm to protected freedoms. We turn in a moment to those factors in the equation. But in terms of the ultimate legislative objective to be served, the present case is manifestly stronger even than *Barenblatt, Wilkinson,* and *Braden.* In those cases the House Committee was looking into education and propaganda, and the interest to be served was greater knowledge of the general nature of the Communist conspiracy. Here, as we pointed out above, the investigation was focused upon the vital steel industry in which political strikes or sabotage could seriously endanger the national security; it was focused, too, upon the kind of activity among workers

which had raised grave problems in the labor movement.

2. There was every reason to believe that petitioner could furnish pertinent and valuable information. Petitioner was not subpoenaed as a result of "indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." *Barenblatt v. United States, supra,* 360 U.S. at 134. The Committee had information that petitioner was a long-time Party member who had actively participated in the Party's organization of the steel industry in the Gary, Indiana, area (see *supra,* pp. 10, 11, 13, 14), which was a vital part of the subcommittee's investigation of Communist activities in basic industry in Gary (see *supra,* pp. 3, 5, 7, 10, 12). He was apparently one of the "professional revolutionaries" with high education whom the Party had recruited to conceal their pasts, pose as laborers, and thus gain, for Communist purposes, key positions among the workers in basic industries (R. 165–166). His education and experience put him in a position where, if he were willing, he could apparently give invaluable information upon the direction, techniques, and purposes of the program of colonization.

3. It is beyond dispute that the information, which the Committee had reason to believe petitioner could furnish, was highly relevant to its legislative purposes. The Committee was investigating reports of Communist infiltration of basic industry in the Gary area by highly educated "professional revolutionaries" posing as ordinary workers. Reportedly, petitioner was

such a man. If this were true, it would be evidence of the truth of the reports, and of at least the partial success of the program. Affirmative answers, which the Committee had reason to expect, would also open the door to further inquiries eliciting more detailed informaiton. The direction of the questioning was fully explained to petitioner (see *supra*, pp. 4–5, 7, 9–10); it is also apparent upon the face of the questions. The answer to the introductory question concerning his residence prior to September 1957 (Count 1) would show whether he had been in Gary and therefore would, as an alleged member of the Communist Party, have a knowledge of Communist activities there. In addition, if the subject of his residence was carried back, it would indicate the truth or falsity of his application for employment, a fact tending to prove or disprove the reports concerning methods of "colonization." The relevance of the direct questions concerning "colonization" (Counts 2 and 4) is too plain for argument.

Whether petitioner was a member of the Communist Party in June 1949 when he sought employment in a Gary steel mill (Count 3) went to the heart of the question: an affirmative answer would help to confirm the reports of "colonization" and show that petitioner could give further information; a negative response would tend to show that the reports were exaggerated or inaccurate. In this respect, as in others, the present case is well within prior decisions. In *Barenblatt, supra* three of the five questions which the witness had refused to answer concerned his membership in the Communist Party (*id.* at 114): "Are you now a member of the Communist Party?"; "Have you ever been a member of the Communist Party?"; "Were

you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?" This Court specifically affirmed the conviction on the ground that these three questions were valid. *Id.* at 115. In *Wilkinson*, the sole question on which the witness was convicted, and therefore the question on which this Court affirmed, was "Are you now a member of the Communist Party?" 365 U.S. at 407. And in *Braden*, of the six questions on which petitioner was convicted, the question on which this Court affirmed was "Were you a member of the Communist Party the instant you affixed your signature to that letter?" 365 U.S. at 433, note 2. The question involved in Count 3 here—"Were you a member of the Communist Party on the 23rd day of June, 1949, which is the date of application filed in your name for employment in Gary?," *i.e.*, whether petitioner was a Party member at a particular time—is virtually identical to the questions in the *Barenblatt*, *Wilkinson*, and *Braden* cases and is in itself, as we have noted (p. 24) sufficient to sustain the conviction.[18]

Petitioner argues that there was no governmental interest in questioning him because the Committee already had all the information concerning Communist activities that petitioner could have supplied. Although there are other answers to petitioner's argument in this case (see *infra*, pp. 61–63), we most earnestly submit

[18] The pertinency of the questions to the subject under inquiry was not only clear on the face of the questions, but was explained to petitioner at the hearing (see *supra*, pp. 4, 5, 7, 9–10), even though he did not explicitly claim any lack of pertinency to the subject under inquiry then or at any time during the judicial proceedings.

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that the power of a Congressional committee to ask material questions in the course of an inquiry into a proper subject of legislative investigation cannot be made to depend upon a judicial determination of how helpful the Court would find the information. The pertinency of the questions to a duly authorized subject of investigation must be clearly established. The objective must be legislation, not prosecution, adjudication, or exposure (see *infra*, pp. 67–70). We also assume *arguendo* that there must be reason to believe that the witness has pertinent information. The public importance of Congress' acquiring pertinent information upon the subject under investigation must be weighed against any potential damage to liberties protected by the Bills of Rights. But once these points are covered, the judicial function is exhausted. The Court would be assuming to exercise the legislative function if it undertook to decide just how necessary—or how helpful—particular information would be. Choosing among relevant lines of inquiry, deciding when the ground has been adequately covered, relying upon testimony already received, or seeking further disproof or corroboration all are parts of the process of legislative investigation. For the court to undertake them would be inconsistent with the presumption of validity due to a coordinate branch of the government and violative of the separation of powers. See *Watkins* v. *United States*, 354 U.S. 178, 215.

This precept is as necessary in practice as it is sound in principle. No one can tell how helpful a logically material bit of evidence may be in the legislative

process without studying and drawing inferences from the evidence already introduced, ascertaining and appraising the other sources of information, weighing the kinds of legislation that might be drafted, and anticipating the probable response of the Senate and the House to particular evidence. A printed record supplies no basis for undertaking such a task; it can be performed only by lawmakers as part of the process of legislation.

In the present case, moreover, it is clear that the information sought to be elicited from petitioner would have been extremely helpful to the Congress. Petitioner argues that the Committee had conducted hearings in other localities upon the same or similar subject matter; that other witnesses at the Gary hearing testified concerning all the information known to petitioner; and that therefore the Committee sought only corroboration from petitioner. But even if petitioner's conclusion were correct and the Committee had expected to receive only corroborating testimony from him, there is an important governmental interest in having a well-informed witness confirm previous testimony—particularly when the existing evidence is in a controversial area and is therefore likely to be challenged. Especially in the area of subversive activities, the need for legislation may be a function of numbers. Communist control legislation touches upon civil liberties. If the "professional revolutionaries" seeking "to colonize" the basic steel industry were few or unsuccessful, a legislator might well conclude that the dangers might not justify the costs of legisla-

tion. If the infiltration were on a larger scale and more successful, he might reach the opposite conclusion.

Furthermore, it is not true that the Committee was seeking only cumulative evidence from petitioner. The Committee "knew nothing about the actual activities of the Communist Party * * * in Indiana as of the time of this hearing or shortly before" (R. 55). And there was every reason to believe that petitioner could give data about his training, activities, supervision, and contacts with other Communist infiltrators in a degree of detail supplied by no other witnesses. Certainly, the Court is not bound by the bare arguments of petitioner's counsel. Petitioner offered no proof that he could not have contributed new information to the investigation. He did not prove at his trial what information he had at the time the Committee questioned him. He cannot unilaterally determine—by comparing his own knowledge which he has not disclosed with the information he now claims was possessed by the Committee—that he could supply the Committee with no new information.[19]

The hearings which investigated Party colonization activities in other parts of the country (see Pet. Br.

[19] Even if petitioner had testified at his trial concerning the information he possessed at the time of the hearing, we do not think a defense would have been established merely because the Committee already had the information. At the least, petitioner would have had to give this reason for his refusal to answer at the time he appeared before the Committee. Even then, as we have stated above (pp. 59–61), we think that the value of petitioner's information—whether it was merely cumulative or not—was for the Committee to determine.

19) were, on their face, principally concerned with different, although related subjects. Although the Committee had information concerning two of the questions (petitioner's residence in 1957 and whether he was a Party member in 1949), these were only preliminary questions to establish that petitioner had knowledge of Party activities in the steel industry in the Gary, Indiana, area. Petitioner's answers to the other two questions concerning his own knowledge of Party activities in the steel industry in Gary (whether he knew of Party colonization in the steel unions in Gary before 1957 and whether there were Party colonies in the steel unions in Gary in 1957) might merely repeat previous testimony before the Committee. On the other hand, as the Committee hoped and expected (see *supra,* pp. 14–15), petitioner's answer might well provide new information in view of his active participation in these Party activities. In short, the Committee had reasonable ground to believe that petitioner had highly useful information on Communist infiltration in the steel industry.

4. In weighing the governmental interests in obtaining information from petitioner against the individual interests which he asserts, it is surely relevant that petitioner is asserting a right, not to express his beliefs and engage in open political activities, but to keep them secret; and he is complaining, not of any governmental abridgment of freedom of expression and association, but of fear of the lawful reactions of those who do not share his opinions, once the truth is known. In pointing this out we

do not mean to suggest that there is no constitutional issue. The Constitution implicitly recognizes a fundamental right of privacy against undue governmental prying, and a measure of privacy may be essential to freedom of belief and also, in the beginning, to effective political organization. That a constitutional question is raised, moreover, was adjudicated in *Watkins* v. *United States,* 354 U.S. 178, 196–198.

Nevertheless, the exact nature of the constitutional right asserted must be taken into account in weighing the governmental against the private interest. This is not a case of governmental interference with the political processes essential to the conduct of democratic government. Cf. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, note 4. Nor can petitioner invoke the ultimate purpose of constitutional protection of speech "to foster peaceful interchange of all manner of thoughts, information and ideas." See the dissenting opinion of Mr. Justice Jackson, in *Kunz* v. *New York,* 340 U.S. 290, 295, 302. The guarantee of freedom of expression rests in the final analysis upon belief in the value of free competition in ideas when openly and publicly debated. In *Whitney* v. *California,* 274 U.S. 357, 372, 375, 377, Justices Brandeis and Holmes, concurring, stated:

> Those who won our independence believed * * * that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discus-

> sion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.
>
> * * * * *
>
> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[20]

Petitioner is unwilling to stake his beliefs upon such a test. He was not called in reprisal for any

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[20] The same basic idea was expressed by Mr. Justice Black, with whom Mr. Justice Douglas concurred, dissenting in *Viereck* v. *United States*, 318 U.S. 236, 251:

"Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment." * * *

The case involved a conviction for wilful omission of material facts on registration statements filed under the Foreign Agents Registration Act. The omissions concerned the activities of the defendant other than those in which he engaged as an agent of a foreign principal. The Court reversed the conviction on the ground that the Act did not authorize the Secretary of State to require that such information be furnished. Thus, the Court's reversal of the conviction in *Viereck* was based on grounds not material here. The quotation from the dissenting opinion was part of Mr. Justice Black's contention that "[n]o strained interpretation [of the Act] should frustrate its essential purpose." 318 U.S. at 251.

See also *United States* v. *Harriss*, 347 U.S. 612, 625-626; *United States* v. *Peace Information Center*, 97 F. Supp. 255 (D. D.C.).

thing that he had said. His fear is of public knowledge and discussion of the information the Committee sought to elicit. Nothing in the government's case against petitioner seeks to justify the slightest curtailment of true freedom of expression.

There is much less foundation for petitioner's claim of prejudice to fundamental freedoms than in *Barenblatt, Wilkinson,* and *Braden.* Barenblatt was a college teacher by profession and the investigation was into Communist infiltration in the field of education. The area is one of special and sensitive concern for full freedom of inquiry (cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250, 257, 260–264), and the inquiry was necessarily concerned primarily with ideas and propaganda. Similarly, in *Wilkinson* and *Braden* the Congressional inquiry was focused on Communist activities in spreading propaganda. Wilkinson was taxed at the hearings with having been sent to Atlanta, Georgia, "for the purpose of developing a hostile sentiment to this committee and to its work for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings." 365 U.S. at 416 (dissenting opinion of Mr. Justice Black). Braden apparently was called at least partly as a result of public letters urging opposition to measures there pending in Congress and criticizing the House Un-American Activities Committee. 365 U.S. at 451–454. There is no suggestion that the reason petitioner was subpoenaed had any connection with political opposition, and, surely, infiltration of critically important steel mills cannot be likened to political propaganda or college education.

In sum, we submit that here, far more clearly than in *Barenblatt*, *Wilkinson*, and *Braden*, the public interests served by the Congress's acquisition of pertinent information from petitioner concerning the threat of Communist infiltration of the vital steel industry—knowledge to be used in considering whether to enact remedial legislation—plainly outweighed petitioner's private interest in maintaining secrecy.

D. PETITIONER HAS MADE NO CASE OF EXPOSURE FOR THE SAKE OF EXPOSURE

The power of Congress to use compulsory process in eliciting testimony depends upon the existence of a legislative purpose. In *Kilbourn* v. *Thompson*, 103 U.S. 168, this Court held the process and subsequent citation for contempt invalid because the investigation was judicial in nature and "could result in no valid legislation on the subject to which the inquiry referred." *Id* at 195. And in *Watkins* v. *United States*, *supra*, the Court said (354 U.S. at 200):

> We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals.

The admonition has been repeated in later cases. *E.g.*, *Hutcheson* v. *United States*, 369 U.S. 599, 614.

We have shown above (pp. 36–45, 48–51) that conditions in basic industry are well within the power of

Congress to regulate, especially in the area of political strikes and national security. That this was the subject of the inquiry is apparent from the authorizing resolution; it was also explained to petitioner both at the start of and during the hearing (see *supra*, pp. 3–4, 4–5, 9–10). And the relevance and usefulness of the information that petitioner apparently could furnish is clear beyond dispute (see *supra*, pp. 58–59, 61–63).

Furthermore, there can be no doubt that Congress and the Committee as its delegate were actually concerned with possible legislation in this very area. Congress had already dealt with the subject in several enactments. In 1947 the Labor Management Relations Act inserted Section 9(h) into the National Labor Relations Act, closing the facilities of the National Labor Relations Board to unions whose officers had not filed non-Communist affidavits. See *American Communications Association* v. *Douds*, *supra*, 339 U.S. 382. After 12 years experience Congress deleted this provision and, in Section 504 of the Labor Management Reporting and Disclosure Act, made it a crime for a member of the Communist Party to hold union office. 73 Stat. 536, 29 U.S.C. 504. The Subversive Activities Control Act of 1950, as amended by the Communist Control Act of 1954, deals extensively with unions found to be Communist fronts or Communist-infiltrated. Act of September 23, 1950, 64 Stat. 987, 998, as amended by Act of August 24, 1954, § 10, 68 Stat. 778, 50 U.S.C. 792a. The resolution authorizing the hearings in this case, and the opening statement of the chairman at the hearings specifically referred to the

Committee's interest in appraising the effectiveness of the Communist Control Act and considering amendments thereto. Besides the legislation described in the resolution, the Committee had other legislation regarding Communism at the time petitioner was subpoenaed (*see supra*, pp. 12–13). At least two measures were directly related to subversive activity at critical defense facilities such as basic steel mills: a proposed Defense Facilities Protection Act of 1959 and H.R. 8121, which would have authorized the Secretary of Defense to establish a security program covering defense contractors and their employees.

With this legislation pending and the witness in a position to give highly relevant information, one could conclude that the Committee was abusing its powers only by challenging the motives of its members. The Court has consistently refused to embark upon such an inquiry. It is "not our function," the Chief Justice said in *Watkins*, to engage "in testing the motives of committee members. * * * Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." 354 U.S. at 200. Accord, *Barenblatt* v. *United States*, 360 U.S. 109, 132; *Wilkinson* v. *United States*, 365 U.S. 399, 412. The rule is not new, nor is it confined to Congressional investigations. As long ago as *McCray* v. *United States*, 195 U.S. 27, 55, it was held that there is no authority in the judiciary to restrain a lawful exercise of power by another department of the government because a wrong motive or

purpose has impelled the exercise of the power. See also *Arizona* v. *California*, 283 U.S. 423, 455.

The record contains not the slightest indication that the purpose of the Committee was to expose petitioner. Petitioner has not made that contention. In this respect the present case again is stronger than *Barenblatt*, *Wilkinson*, *Braden*, and *Uphaus*, and affirmance here would be consistent with an important ground of dissent in those cases. Thus, in *Barenblatt*, the sole reason stated by Mr. Justice Brennan for reversing the conviction was that "no purpose for the investigation of Barenblatt is revealed by the record except exposure merely for the sake of exposure. This is not a purpose to which Barenblatt's rights under the First Amendment can validly be subordinated." 360 U.S. at 166. Here the record demonstrates conclusively that the Committee had a legislative purpose and was not intending to expose witnesses or anyone else. Mr. Justice Brennan's dissenting opinions in *Uphaus* and *Wilkinson* are distinguishable upon the same ground, as are large portions of the opinions of Mr. Justice Black and Mr. Justice Douglas.[n]

[n] In *Braden*, Mr. Justice Douglas' dissenting opinion, in which Mr. Justice Brennan joined, was based entirely on the ground that the witness' conviction was invalid because his refusal to answer the Committee's questions was based on his reliance in good faith on the *Watkins* decision. 365 U.S. at 456–457. The majority of the Court, relying on *Sinclair* v. *United States*, 279 U.S. 263, 299, held that such a mistake of law is no defense. 365 U.S. at 437–438. Petitioner here makes no contention that he relied in good faith on earlier decisions and therefore this issue is not before the Court.

II

THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY CONCERNING THE FIRST AMENDMENT ISSUE

Petitioner also argues (Pet. Br. 21–25) that the trial court erred in refusing to consider the proffered expert testimony of Professor Emerson in weighing the private and public interests in order to determine petitioner's First Amendment rights. This contention is likewise erroneous.

A. Professor Emerson's qualifications as an expert were that he was a professor of law at Yale University and had made extensive studies in the field of civil liberties (R. 93–97). He testified that he had "concerned [himself] a good deal with the Committee on Un-American Activities" (R. 97). His attention was then directed to this Court's decision in *Barenblatt* v. *United States, supra,* with which he stated he was familiar, and he was asked, (R. 97):

> Have you an opinion as to the various considerations which have to be taken into account in balancing the competing public and private interests at stake in the circumstances here presented?

The government objected on the ground that the question sought testimony from the witness on a matter of law, not of fact: "The question invades the province of the Court. It is asking for an interpretation of existing cases, which it is for this Court to decide, not for the witness to decide, whether or not he is an expert" (Tr. 228).[22]

[22] "Tr." refers to the reporter's typewritten transcript of the trial proceedings.

The trial court held that the question sought in effect an involved legal opinion (R. 98) and sustained the government's objection to its admission (R. 99). The court, however, permitted petitioner to put the testimony into the record as an "offer of proof" for purposes of appeal. Petitioner's counsel rephrased the question to insert the word "factual" before the word "considerations" (R. 99). The government again objected and the objection was sustained (R. 100).

Professor Emerson testified that the government's interest in seeking information from petitioner was to pass legislation protecting against overthrow of the government by force and violence (R. 100). He stated that in weighing this interest the court should consider six factors. First, present statutes (which he described) already performed this purpose. Second, the country was strong economically, politically, and socially. Prosperity, according to Professor Emerson, made an economic collapse unlikely; no strong radical groups existed which constituted a danger to internal security, particularly since there was no indication that the police or military were sympathetic to attempts to overthrow the government; and there was no serious social unrest (R. 103). Third, Professor Emerson testified, the Communist Party was extremely weak in 1958 both in numbers and positions of importance; security programs prevented the infiltration of government and industry; and Communist power in labor unions, religious and educational institutions, and the Negro community was extremely small (R. 103-106). The fourth factor in

determining the government's interest was the activity of the A.F.L.–C.I.O. and other unions in preventing Communist infiltration of labor (R. 106–107). Fifth, Professor Emerson stated that the House Un-American Activities Committee, as shown by its reports, already "had taken substantial testimony on the questions that they addressed themselves to in the Gary proceedings" (R. 107). And, finally the Committee could obtain substantial information from voluntary witnesses (R. 108).

Professor Emerson then expressed his opinion concerning the factors which the district court should consider in determining the individuals' interest in refusing to testify. First, citing Milton, Jefferson, Mill, Chaffee, Holmes, Brandeis, and recent psychological studies, he testified that the "freedom of expression is essential to individual integrity and dignity" and to the right to develop and realize the individual's potentialities (R. 108). Second, the witness said, the right of silence "recognized in the classic flag salute case" "is particularly important in modern society when so many pressures tend toward conformity" (R. 109). And, third, the individual has the right of association which "is based on the weakness of the individual as a single person to accomplish political or social change" (R. 109). Professor Emerson emphasized that society, as well as the individual, has an important interest in freedom of expression since it "is a basic and absolutely fundamental principle of the democratic process" (R. 109). He described the serious effect on the individual's interest from Congressional investigation of

beliefs and associations: the mere questioning of the witness inhibits him from freely expressing himself; economic harm often results such as the loss of employment; and the witness is often socially ostracized (R. 110–111). In addition, other people besides the witness become afraid to engage in similar political activity and associations (R. 111). These effects are not confined, according to Professor Emerson, to the Communist Party since it is impossible to draw any clear line; the "whole area left of center * * * becomes smeared * * * with the same color" (R. 111–112).

Finally, Professor Emerson stated that he thought that the forces in this country tending toward a closed society restricting independent thinking and activity were now stronger than those supporting an open society (R. 113). In support of this judgment, he noted the great number of government employees subject to loyalty tests, the large units which dominate the economy, and the unanimity of opinion expressed by mass media and educational institutions (R. 113–114). He therefore stated that "as of this time what is needed, in terms of freedom of expression, is that society encourage independence, unorthodoxy and differences * * *" (R. 114).

Professor Emerson concluded (R. 115):

> My answer is, on the basis of the foregoing considerations, it is my opinion that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to pro-

> tect internal security are substantially outweighed by the interest of the individual in freedom of speech or silence, as he may prefer, and by the interest of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society.

After hearing Professor Emerson's testimony, the government renewed the objection to its admission, on the same grounds as previously stated (R. 115). In finally excluding the proffered testimony, the trial court said (R. 116):

> [I]t seems to me that expert testimony of this kind is not material in that it is not a question of fact as to what elements go to make up the balance of interests, public and private, but a legal matter, which is within the province of the Court to decide; and it is not a subject of expert testimony.

Petitioner's contention that the trial court's refusal to allow the introduction of Professor Emerson's testimony was reversible error is without merit for at least two reasons. First, we submit that, as the two courts below held, the testimony was not properly admissible. It consisted principally of arguments concerning what legal factors the court should consider and what weight should be given to each of these factors, not with factual evidence relating to the factors which the court might consider. Thus, Professor Emerson's statement, coming at the close of petitioner's case, reads like the closing argu-

ment of able counsel summarizing his client's legal position under the First Amendment. While such a statement could be properly presented by petitioner's counsel as legal argument, the trial court correctly held that it was not evidence.

Second, even if Professor Emerson's testimony were properly admissible, we submit that petitioner's conviction should nevertheless be sustained. This testimony was offered solely in relation to petitioner's claims under the First Amendment. The issue whether a witness' rights under the First Amendment have been violated by a Congressional committee is, as the *Barenblatt*, *Wilkinson*, and *Braden* cases plainly show, a question of law. Therefore, this Court can consider Professor Emerson's testimony which is fully set forth in the record—in determining petitioner's First Amendment claims (assuming, contrary to our contentions above, that the testimony is admissible for this purpose).

There is no need for the district court to make the initial determination of the issue whether petitioner's First Amendment rights have been violated on the basis of the record including Professor Emerson's testimony. Not only is the issue, as stated above, a question of law, but we think its resolution is perfectly clear. Professor Emerson's testimony gave no new legal or factual considerations which were not considered by this Court in *Barenblatt*. There the Court relied heavily on numerous earlier decisions which described the serious danger to the country arising

from Communist activities (360 U.S. at 127–129). *E.g., American Communications Ass'n v. Douds*, 339 U.S. 382, 388–389; *Dennis v. United States*, 341 U.S. 494, 498; *Carlson v. Landon*, 342 U.S. 524, 535–536; see Subversive Activities Control Act of 1950, Title I, § 2, 64 Stat. 987–989. On the other hand, Mr. Justice Black, in dissenting in *Barenblatt*, emphasized the interest "in being able to join organizations, advocate causes and make political 'mistakes'" and contended that the interest of the government in "self-preservation" was "vastly overstated." 360 U.S. at 144. Professor Emerson's testimony added little to these basic contentions except to spell out the competing considerations in greater detail. Thus, he presented no evidence which could change the Court's determination in *Barenblatt*, *Wilkinson*, and *Braden* that Congressional committees can compel witnesses to testify concerning their Communist activities without violating the First Amendment. And, as we have shown earlier (pp. 56–57, 66, 70), the particular circumstances of this case are even stronger in favor of the governmental as opposed to the private interests than in those three cases.[23]

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[23] The Court also noted, in weighing the government's interest, the valid legislative purpose of the committee, the relevancy of the questions asked the witness, and the lack of any indication that the committee was trying to pillory the witness or was using dragnet procedures (360 U.S. at 132–134) (see *supra*, pp. 57–59, 67–69).

III

THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS NOT UNCONSTITUTIONALLY VAGUE

Petitioner contends (Pet. Br. 30–32) that the statute under which he was convicted, *i.e.*, House Rule XI, the Committee's authorizing resolution, was unconstitutionally vague. In fact, however, the petitioner was convicted of violating 2 U.S.C. 192 (see Pet. Br. 3), the contempt-of-Congress statute, which is perfectly clear. Convictions under this statute have been repeatedly upheld by this Court, as in the *Barenblatt*, *Wilkinson*, and *Braden* cases.

Petitioner's argument is therefore not aimed at the statute under which he was convicted, but rather at the resolution of the House of Representatives authorizing the Committee to conduct investigations of Communist activities. Rule XI, Rules of the House of Representatives, 60 Stat. 823, 828 (see Pet. Br. 3). Rule XI, however, is not a criminal statute; it does not prohibit or punish any conduct. Instead, it merely confers authority on the Committee to conduct investigations within a particular area. Thus, the rules for construing criminal statutes do not apply to the construction of Rule XI.

Petitioner, however, claims (Pet. Br. 30) that this Court held in *Watkins* v. *United States*, 354 U.S. 178, 208, and *Sacher* v. *United States*, 356 U.S. 576, 577, that Rule XI must be treated as a criminal statute.[24]

[24] The *Sacher* case actually involved the Senate Internal Security Subcommittee, which, of course, has a different authorizing resolution.

Those cases state only the proposition, to which we of course agree, that "the courts must accord to the defendants [under 2 U.S.C. 192] every right which is guaranteed to defendants in all other criminal cases." 354 U.S. at 208. The Court then went on in *Watkins* and *Sacher* to require that the Congressional committee explain to the witness, upon proper objection, the pertinency of its questions to the subject under inquiry. But, as the Court expressly said in *Watkins*, the subject under inquiry could be made clear to the witness not merely by the House or Senate resolution establishing the Committee but also by the resolution of the committee authorizing the particular hearings, the opening statement of the committee chairman, the testimony of other witnesses who appear at the hearings and statements made by the committee to them, and statements made by the committee to the particular witness himself. 354 U.S. at 209–214. Thus, in *Barenblatt*, the Court relied on the opening statement of the chairman and testimony by other witnesses to show the subject under inquiry. 360 U.S. at 124–125. Rule XI was considered in *Barenblatt* only in order to determine whether the committee was authorized by the House of Representatives to conduct the investigation. In no contempt-of-Congress case has the Court considered Rule XI as part of a criminal statute under which the witness was convicted.

It is therefore clear that the government is required to rely on Rule XI only to show that the Committee was authorized by Congress to investigate Communist activity in basic industry. This Court has specifically

held that Rule XI is sufficiently clear to give the Committee authority to investigate Communist activities. In *Barenblatt,* the Court stated (360 U.S. at 117):

> Petitioner also contends * * * that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation into Communist activity. We cannot agree with this contention, which in its furthest-reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances.

After an extensive discussion of the history of Rule XI, the Court concluded that "the Rule cannot be said to be constitutionally infirm on the score of vagueness." 360 U.S. at 122–123. Similarly, in *Braden,* this Court rejected the petitioner's contention that Rule XI was "fatally vague"[25] by holding that Rule XI properly authorized the investigation, 365 U.S. at 433; see also *Wilkinson* v. *United States,* 365 U.S. 399, 409.

In all three of these cases, this Court upheld convictions under 2 U.S.C. 192 for refusal to answer questions asked by this very same Committee pursuant to the authority given it by the House of Representatives in Rule XI. Rule XI was sufficiently clear to sustain a conviction in those cases; it is equally sufficient, under essentially the same circumstances, to sustain petitioner's conviction here.

[25] See the petitioner's brief in No. 54, Oct. Term 1960, pp. 40–42.

IV

THE COMMITTEE'S RULES DID NOT REQUIRE THE COMMITTEE TO GRANT PETITIONER'S REQUEST TO APPEAR AT AN EXECUTIVE SESSION

Petitioner argues (Pet. Br. 26–29) that the Committee's failure to allow him to appear at an executive session, instead of at the public hearings, violated its rules, and so excused his refusal to answer questions in the public session. This argument, too, is without merit.

Although petitioner was served with the Committee's subpoena on January 23, 1958 (Gov. Ex. 2, p. 2), he did not ask the Committee to appear at an executive session until February 6, 1958, the Thursday preceding the Monday on which he appeared as a witness. On that date, his counsel sent a telegram which was addressed to the Committee counsel, not to the Committee or its chairman (R. 284a), which stated (Def. Ex. 1):

> Undersigned represents Edward Yellin and Nicholas Busic. On their behalf I request executive session in lieu of open session. Testimony needed for legislative purposes can be secured in executive session without exposing witnesses to publicity.

Since the telegram arrived in Washington after the Committee chairman and counsel had left for Gary, Indiana, to conduct the hearings (R. 37, 39), it was answered by the Committee staff director, who denied the request (Def. Ex. 2). The record shows that the staff director had no authority to act on petitioner's request (R. 286a).

Petitioner relies on Rule IV–A of the Rules of Procedure of the House Committee on Un-American Activities as requiring the Committee to grant his request for an executive session. Rule IV–A states:

> If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injury his reputation, or the reputation of other individuals, the committee shall interrogate such witness in an executive session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.

Rule IV–A does not give a witness a right upon request to an executive session whenever specified circumstances are present so that the Committee's refusal to provide this right is reviewable in the courts. Instead, the rule leaves it to a majority of the Committee, or appropriate subcommittee, to decide whether to interrogate the witness in executive session. Thus, the rule provides that a witness be questioned in executive session whenever "a majority of the Committee or subcommittee * * * *believes* that the interrogation of a witness in a public hearing might * * * unjustly injure his reputation * * *" (emphasis added). This language gives the Committee sole discretion whether to hear a witness in public or executive session.

The Committee in fact decided not to have petitioner testify at an executive session even though

it did not know that petitioner had requested such an appearance. Congressman Walter testified that "the Committee * * * passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable * * *" (R. 70).

We have emphasized that Rule IV–A confers no right on petitioner to have this determination reviewed by the courts. Even if Rule IV–A did implicitly provide for a right of review, it is clear than a Congressional committee has broad discretion in determining its own procedure upon such questions as whether to hear a witness in an executive or public session. There is nothing in this record to suggest that the Committee abused its discretion in this case.[26]

V

THE QUESTIONS WHICH WERE THE BASES FOR COUNTS 2 AND 4 WERE NOT TOO VAGUE TO SUPPORT THE INDICTMENT

Petitioner claims (Pet. Br. 32–34) that the questions contained in Counts 2 and 4 are too vague to

[26] Petitioner also suggests (Pet. Br. 27, footnote) that Rule XI(m) of the House Rules gave him the right to appear in executive session. The language of this provision indicates that it was intended to protect persons other than the witness himself from being injured since it allows the injured person "an opportunity voluntarily to appear as a witness * * *" As the Committee counsel testified at the petitioner's trial (R. 88–90), this was the Committee's interpretation of the Rule. Moreover, Rule XI(m), like Rule IV–A of the Committee's own rules, confers no right on anyone to appear in executive session unless the Congressional committee so determines—a determination which was not made in this case.

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satisfy the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure, which require "that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation." The question involved in Count 2 was: "Will you tell the Committee, please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1957?" The question involved in Count 4 was: "Will you tell the Committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party?"

Petitioner specifically does not question the fact that he understood the meaning of these questions. Rather, he states that "[t]he issue was not whether he understood the question, but whether the indictment met the requirements of the Sixth Amendment and of Rule 7(c) of the Rules of Criminal Procedure" (Pet. Br. 33).

A. First, even if, contrary to our contentions below, Counts 2 and 4 are invalid because of the vagueness of the questions, petitioner's convictions still must be affirmed. He received concurrent sentences on all four counts and therefore his conviction must be sustained if any one count is valid. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115. Thus, petitioner's attack on these two counts need not even be considered by the Court.

B. Second, petitioner is precluded from raising this issue because it was not presented—or even sug-

gested—in his petition for a writ of certiorari. Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, he cannot raise it in his brief on the merits unless there was "plain error." *E.g., Kessler* v. *Strecker,* 307 U.S. 22, 34.

C. In any event, petitioner's contention is clearly without merit. The Sixth Amendment and Rule 7(c) require that "[t]he indictment * * * be a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c)), so that the accused can adequately defend himself and can plead a conviction or acquittal in bar of a subsequent prosecution for the same offense. *E.g., Russell* v. *United States,* 369 U.S. 749, 762–764; *United States* v. *Debrow,* 346 U.S. 374, 376–378. The indictment set out clearly the Committee's investigative authority, the subject under inquiry, the facts concerning the hearing, the subpoenaing of petitioner, his appearance, and his wilful refusal to answer five pertinent questions, each of which was quoted (R. 1–3). Thus, whether or not the questions themselves were vague, these allegations clearly and sufficiently allege that petitioner violated 2 U.S.C. 192 by wilfully refusing to answer pertinent questions asked by a Congressional committee. The fact that the indictment did not spell out the meaning of the questions did not prejudice petitioner either in preparing his defense or by allowing the possibility of a new prosecution for the same offense.

As to preparing his defense, it would not have helped petitioner to have the indictment specify the meaning of the questions. The charge was that he

had refused to answer the questions. The only possible defense which could turn upon their meaning is that petitioner refused to answer the questions because he did not understand them. But that defense depends on whether petitioner understood their meaning when he appeared before the Committee; if he did not understand the questions at that time, it would do no good to acquaint him of their meaning in the indictment.[27] As to a second prosecution, the indictment specified the Committee holding the hearing, the time of the hearing, and the questions petitioner refused to answer. There was no possibility of a second prosecution for petitioner's refusal to answer these same questions.

The indictment was not required to detail the meaning of the questions which petitioner refused to answer either by describing their context in the hearing or by defining the various words which were used. Frequently, questions standing alone are vague and ambiguous. For example, in the *Barenblatt* case, this Court upheld the conviction of a witness for refusing to answer the question, "Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?" 360 U.S. at 114. The indictment never described the Haldane Club or its exact connection with the Communist Party. A requirement that such questions be explained in the indictment would be contrary to the language and

[27] We show below (pp. 87–90) that petitioner did understand the questions at the time he refused to answer them and that, in any event, this defense is not open to him since he did not claim that the questions were vague at that time.

purpose of Rule 7(c) that the indictment be a concise statement of the essential facts. The meaning of the question is not an essential element of the crime of contempt; it is the wilful refusal to answer which constitutes the crime.

D. It appears, despite the denial in his brief, that petitioner's real contention is that the questions did not adequately apprise him of the information sought by the Committee and that therefore he cannot be convicted of contempt. We agree that a witness before a Congressional committee cannot be convicted of *wilfully* refusing to answer questions asked by a Congressional committee if the witness informs the Committee that he cannot understand what information the Committee is seeking and the Committee nevertheless fails to state or explain the questions with reasonable clarity. We emphasize, however, that the witness is required to object on the ground of vagueness at the time the questions are asked by the committee. Just as with regard to the pertinency of the questions to the subject under inquiry, the committee can easily explain the meaning of its questions if the witness is in doubt. Therefore, the issue of vagueness, like the issue whether the committee sufficiently apprises the witness of the pertinency of the questions (*Barenblatt* v. *United States, supra,* 360 U.S. at 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469), cannot be raised for the first time at trial. Here, petitioner, although he made several objections to the questions he refused to answer, did not even indicate that he failed to understand them.

On the other hand, unlike the situation with regard to the issue of pertinency, we do not think that the government is required to prove the meaning of the questions at the witness' trial for contempt when he fails to raise the issue before the committee. In *Deutch,* this Court held, even though the pertinency of the questions was not questioned at the hearing, that the government is required to prove pertinency at the trial. 367 U.S. 468. This holding was based entirely on the explicit requirement of 2 U.S.C. 192 that the questions be "pertinent to the question under inquiry." Since 2 U.S.C. 192 does not make the clarity of the question an element of the offense, we do not think that the government is required to prove it, unless it was timely raised before the committee itself.

In any event, in this case, the meaning of the questions in Counts 2 and 4 was made clear to petitioner at the hearing and the introduction of the transcript of the hearing satisfied any burden the government may have had to show their meaning at petitioner's trial. The only possible vagueness in the two questions concerns the words "colonization" in Court 2 and "colonizer" in Count 4. Petitioner admitted that he was present while John Lautner, a long-time high official in the Communist Party, testified before the Committee (Hearings, p. 1976). During this testimony, the Party's colonization program was repeatedly described. Lautner testified that, after the 1945 reconstruction of the Party, a policy of colonization was begun (*id.* at pp. 1964–1965). He described as

Party colonizers trained Party members who were assigned to organize Party activities in the steel industry in the Middle West (*id.* at pp. 1965–1966). Lautner further testified that after the 1948 Party convention one J. Peters "organized a number of classes for colonizing party members" and that in the spring of 1949 Party members, who had just graduated from college, became colonizers in various industries (*id.* at p. 1967). At this point, Lautner defined a "colonizer" (*id.* at p. 1968):

> A colonized Communist is one who is a professional revolutionary, who has uprooted himself from his home environment and carried out a party instruction, one who may have had personal problems, family problems, but that was secondary. The first was the problem of the party, and he submitted himself to become a person who will solve for the party their problems and become a colonized Communist *to carry out Communist work in a basic industry.* [Emphasis added.]

Lautner said that colonizers get jobs in a major industry by misrepresenting their college education (*ibid.*). Subsequently, the counsel of the Committee summarized Lautner's testimony about Peters: "You told us about * * * classes that were conducted by J. Peters, training young men in the universities to go out and engage in colonization in industry" (*id.* at p. 1968). Lautner said that the Party believed that "the best way to get back into the main stream of labor would be to colonize capable Communist organizers in the basic industries * * *" (*id.* at p. 1971).

Before petitioner was finally ordered to answer the question involved in Count 2 concerning whether he knew of colonization by the Communist Party in steel unions in Gary, Indiana, prior to September 1957, the Party's program of colonization was explicitly described to him. The counsel of the Committee stated (Hearings, p. 1986):

> It has been testified here that colonization of young men in the middle of their educational courses in industry was a deep seated plan of the Communist Party to strengthen itself within basic industry.

After petitioner then told the Committee that he was present when Lautner testified, the Committee counsel said that "[t]he statement was made here of the practice of the Communist Party in colonizing industry at Flint, Michigan; at the University of Colorado, which is at Fort Collins, Colorado, where you now reside; and other places" (*ibid.*).

In short, we submit that the record of the hearings shows that petitioner was fully acquainted with the claim to the Party's colonization program in basic industries before he refused to answer the questions involved in Counts 2 and 4. He clearly knew that the Committee's questions sought to obtain information of Party organizing activities in the steel industry in Gary, Indiana.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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APPENDIX

The House Un-American Activities Committee has made numerous recommendations involving Communist activities generally, which of course include Communist activities in defense plants. In addition, the Committee made the following legislative recommendations having a direct impact on Communist activities in industry, and Congress took the following action on these recommendations, through the year 1960:[1]

1. *Committee recommendation.*—Adoption of H.R. 3903, 81st Cong., 1st Sess., providing for safeguards against employment of subversive individuals in defense plants (March 15, 1950).

Action.—Section 5 of the Internal Security Act of 1950, 50 U.S.C. 784, provides that members of a Communist-action organization, as defined in the Act, shall not hold employment in a defense facility, and that members of a Communist-front organization must disclose such membership when seeking or holding employment in a defense facility.

2. *Committee recommendation.*—Adoption of legislation which subjects officers of national labor unions having bargaining contracts in connection with national defense contracts involving secret and classified work for the Atomic Energy Commission, the Army, Navy, and Air Force, to the same security standards as members who have access to secret or classified material (March 15, 1950).

[1] This information is taken from a Research Study by the Legislative Reference Service of the Library of Congress, entitled *Legislative Recommendations by House Committee On Un-American Activities, Subsequent Action Taken by Congress Or Executive Agencies* (released December 30, 1960).

Action.—On February 2, 1955, the Secretary of Defense issued Industrial Personnel Security Review Regulation (20 Fed. Reg. 1553, 6213, 7139; 32 C.F.R. 67.1 through 67.5–5), which prescribes the uniform standards for determining the eligibility of contractors, contractor employees, and certain other individuals for access to classified defense information, and which establishes procedures for denial, suspension, or revocation of clearance.

3. *Committee recommendation.*—That Congress adopt a resolution calling upon the Secretary of Defense to immediately place in effect the provisions of Section 5 of the Internal Security Act of 1950, 50 U.S.C. 784 (January 2, 1951). Section 5 provides that members of Communist organizations which are registered, or which have been finally ordered to register, with the Attorney General under the Act, shall not conceal their membership in such organization when seeking or holding employment in a defense facility, and, if such organizations are Communist-action organizations, such members shall not engage in any employment in a defense facility. The Secretary of Defense shall designate and proclaim a list of facilities, to which he thinks these provisions should apply in the interests of national security.

Action.—In compliance with Section 5, the Secretary of Defense maintains a current list of defense facilities.

4. *Committee Recommendation.*—Amendment of Taft-Hartley Act to make impossible a situation where a union official formally resigns from the Communist Party and then immediately signs a non-Communist affidavit (January 2, 1951). A similar recommendation, in another form, was subsequently made by the Committee (February 6, 1954).

Action.—The Act of July 26, 1955, amended Section 13A(e) of the Communist Control Act of 1954 to provide that in determining whether an organization is a Communist-infiltrated organization, the Board shall consider to what extent the management of the organization is conducted by one or more individuals who have been members of a Communist organization within the past three (instead of "two") years. 50 U.S.C. 792a(e)(1).

Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 provides that no person who is or has been a member of the Communist Party shall serve as an officer of any labor organization for five years after the termination of his membership in said party. 29 U.S.C. 504.

5. *Committee recommendation.*—That appropriate legislation be enacted requiring an affidavit by any person bidding for a government contract, that he is not now and has not been within the past 10 years a member of any organization advocating the overthrow of the Government by force and violence (January 26, 1955; repeated on January 11, 1956, and January 2, 1957).

Action.—No legislation enacted. However, as noted above (pp. 93–94) the Secretary of Defense issued the Industrial Personnel Security Review Regulation, which prescribes the eligibility of contractors, contractor employees, and certain others for access to classified defense information.

A bill was introduced in the 85th Congress (H.R. 9352) which provides for security clearance of government contractors who have access to classified data. This bill was not enacted into law.

6. *Committee recommendation.*—The enactment of H.R. 8121, 86th Cong., 1st Sess., which was reported out

by the Committee on September 2, 1959 (H. Rept. 1122). The bill would authorize the Secretary of Defense to prescribe uniform standards and criteria for determining the eligibility for access to classified defense information of any person who has a contract or subcontract with a military department or an employee of any such person. This bill was introduced by the chairman of the Committee after this Court held, in *Greene* v. *McElroy*, 360 U.S. 474, that the regulations promulgated by the Secretary of Defense relating to this subject were without explicit authorization by either the President or Congress and, therefore, an employee lacking a security clearance required by such regulations cannot be discharged as a security risk without according him the right of cross-examination and confrontation (February 8, 1960).

Action.—H.R. 8121 was passed by the House on February 2, 1960, but received no action in the Senate.

On February 20, 1960, the President issued Executive Order 10865, authorizing the Secretary of State, Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeornautics and Space Administration, and the Administrator of the Federal Aviation Agency to prescribe, by regulation, specific safeguards necessary to protect (1) releases of classified information to industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies and (2) other releases of classified information to industry that such agencies have responsibility for safeguarding.

* * *

In its annual report for the year 1960, the Committee on Un-American Activities expressed its concern over communist infiltration in basic industry as a result of its investigations (p. 133):

> It is urgently recommended that Congress authorize the President to prescribe regulations, relating to Government contracts with industry, creating industrial personnel security clearance programs, to assure the preservation and integrity of classified information, and reposing in the President a summary or discretionary power to deny clearance, without judicial review, to those not clearly loyal or who may be security risks, with authority to subpena witnesses to testify under oath in matters relating to any investigation or hearing provided for by such regulations.
>
> This committee has established through reliable testimony received in numerous hearings that the Communist Party has deliberately infiltrated basic industry, including of course industry engaged in defense production involving highly classified projects of the military establishments. For example, Mr. John Lautner, an active Communist Party member for more than 20 years prior to his expulsion from the party in 1950, who held high Communist Party office on the national level, testified that as far back as 1932 the Communist Party in the U.S.A. embarked upon a program called "Face to the Shop," which was designed to infiltrate basic industry. He traced the development of that program and testified that in 1948, Henry Winston, who was the organization director of the Communist Party, later convicted in the first Smith Act case, gave a report on the party policy of concentration on basic industry and was able to say "that the reorganization already resulted in establishing over 3,000 Communist Party branches throughout the country, a whole slew of industrial sections, and be-

tween 400 and 500 industrial branches were established by the 1948 convention." Mr. Lautner further testified that most of these party members came from colleges and universities, were young men who were convinced that a so-called bourgeois education and doploma had no future, and had uprooted themselves and become professional revolutionaries, with an objective of colonizing industry. (See Investigation of Communist Infiltration and Propaganda Activities in Basic Industry, Gary, Indiana, Area, Hearings held February 10 and 11, 1958).

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